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## *Sanchez-Llamas v. Oregon* and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, The Right to Consul, and Remediation

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# SANCHEZ-LLAMAS V. OREGON AND ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS: THE SUPREME COURT, THE RIGHT TO CONSUL, AND REMEDIATION

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## I. INTRODUCTION

Article 36 of the Vienna Convention on Consular Relations (Article 36) provides that individuals detained in a foreign country must be notified of their “right” to seek assistance of consul from their country of origin.<sup>1</sup> For the last decade, courts in the United States have struggled to determine how Article 36 should affect the criminal charges against foreign nationals in the United States.<sup>2</sup> Courts have been unable to reach consensus on whether Article 36 creates rights individuals can enforce in criminal proceedings, and if so, what remedies are available for violations of those rights.<sup>3</sup> Two opinions of the International Court of Justice (ICJ) interpreting Article 36<sup>4</sup> have exacerbated this confusion, while the U.S. Supreme Court, until recently, has remained hesitant to rule on the substantive issues surrounding Article 36.<sup>5</sup>

In *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*,<sup>6</sup> the Supreme Court finally broke its silence. However, its ruling leaves the international community with more questions than answers about the future of Article 36 litigation in the United States. Rather than establishing definitive standards for Article 36 relief, the *Sanchez-Llamas* decision suggests relief from Article 36 violations will be accorded on a case-by-case basis, and may not be equally available to all defendants.

The controversy over Article 36 stems largely from the provision’s diplomatic origins. Article 36 was not drafted with an eye towards domestic criminal litigation, but rather as part of the larger Vienna Convention on Consular Relations (VCCR). The VCCR was primarily

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1. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

2. See Sara M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CAL. L. REV. 1729, 1738–40 (2003).

3. *Id.*

4. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

5. The Supreme Court thrice before granted writs of certiorari related to Article 36 in *Breard v. Greene*, 523 U.S. 371, 118 S. Ct. 1352 (1998) (holding that Article 36 claims do not trump federal procedural default rules); *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059 (1997) (holding amendments to habeas corpus statute by the AEDPA did not apply to this noncapital case); and *Medellin v. Dretke*, 544 U.S. 660, 125 S. Ct. 2088 (2005) (previously granted writ of certiorari as to Article 36 issues deemed improvidently granted).

6. The two cases were joined and a joint opinion was issued on them due to similar issues and subject matter. The opinions of *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson* were issued under *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006).

intended to "contribute to the development of friendly relations among nations . . . ." <sup>7</sup> However, Article 36 specifically addressed the disadvantages faced by foreign nationals detained in "legal system[s] whose institutions and rules were unfamiliar." <sup>8</sup> "Article 36 serves as a safeguard to ensure that foreign nationals have the support of individuals who can orient them to the bewildering array of rules that govern the United States criminal justice system." <sup>9</sup>

When foreign nationals are detained in the United States, language, culture, and separation from family create "an aura of chaos surrounding [their detention] . . . ." <sup>10</sup> Detained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in an alien legal system. <sup>11</sup> They are often uniquely vulnerable to fear and manipulation by authorities, <sup>12</sup> and "language and cultural barriers" <sup>13</sup> may hinder their understanding or exercise of fundamental rights. <sup>14</sup> For example, a foreign national could sign a waiver of a fundamental right or a confession while under a misapprehension about the document's contents. <sup>15</sup>

Whereas most American citizens possess basic knowledge of their fundamental constitutional rights, foreign nationals are likely to experience difficulty understanding complex legal concepts like the right to counsel, or the right to remain silent, if no similar rights exist in their home country. In inquisitorial systems, for example, "negative inferences can be drawn from any attempt to remain silent in the face of official questioning about a crime." <sup>16</sup> For foreign nationals accustomed to such systems, *Miranda* warnings alone may be insufficient to explain the American right against self-incrimination. The right to counsel in the

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7. VCCR, *supra* note 1, Preamble.

8. LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991) (quoting U.S. Dep't of State, Telegram 40298 to Embassy Damascus, Feb. 21, 1975).

9. Brief of the National Ass'n of Criminal Defense Lawyers (NACDL) and the Law Council of Australia (LCA) as Amici Curiae in Support of Petitioner Moises Sanchez-Llamas at 14–15, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 04-10566), 2005 WL 3543085 [hereinafter Brief of the NACDL].

10. Linda A. Malone, *From Breard to Atkins to Malvo: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 363, 392–93 (2004).

11. LEE, *supra* note 8, at 145.

12. Brief of the NACDL, *supra* note 9, at 8.

13. "Language barriers" are impediments to communication that occur when a detained foreign national does not speak the same language as detaining authorities. "Cultural barriers" refer to difficulties in understanding cultural institutions that result from a detained foreign national's experiences in her country of origin.

14. Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 605 (1997).

15. Brief of the NACDL, *supra* note 9, at 8.

16. *Id.* at 13. See also Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Toward an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 410–11 (1994).

United States may be similarly incomprehensible to foreign nationals who may presume that a public defender appointed by the state will represent the state.<sup>17</sup> Also, some foreign nationals come from countries where physical abuse by authorities is commonplace. This fear can lead to false confessions and prevent the exercise of fundamental rights.<sup>18</sup>

Consular assistance, when available, can mitigate the harm caused by language and cultural barriers and place detained foreign nationals on equal footing with detained citizens. Such assistance can be a “cultural bridge,” which allows foreign nationals to “navigate the waters of the criminal justice system and . . . help[s] them secure their rights within that system.”<sup>19</sup> Consular officials can explain substantive and procedural rights in the American system in a way that foreign nationals will understand. In addition, many consulates provide translators and contact information for lawyers. Others will retain counsel, locate evidence and witnesses in the home country, or intervene in court proceedings or through appellate filings.<sup>20</sup> For detained foreign nationals, “consular assistance often determines whether they obtain the fundamental rights guaranteed to criminal defendants.”<sup>21</sup>

Article 36(1) of the VCCR sets forth three “rights” aimed at ensuring consular assistance: 1) detained foreign nationals are entitled to “freedom with respect to communication with and access to consular officers of the sending State;”<sup>22</sup> 2) “[a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay;”<sup>23</sup> and 3) “[c]onsular officers shall have the right to visit a national of a sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.”<sup>24</sup> In addition, Article 36(1) provides that detaining authorities must notify foreign nationals “without delay of [their Article 36(1)] rights . . . .”<sup>25</sup> This latter requirement is the basis for most Article 36 litigation in the United States—foreign nation-

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17. Indeed, even domestic defendants have made such claims. *See* *Polk County v. Dodson*, 454 U.S. 312, 322 (1981).

18. *See, e.g.*, *Petition for Writ of Certiorari at 24, Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 04-10566), 2005 WL 2974437.

19. Brief for Amici Curiae Republic of Honduras and Other Foreign Sovereigns in Support of Petitioners at 8, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (No. 04-10566, 05-51), 2005 WL 3597807.

20. *See, e.g.*, Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner Moises Sanchez-Llamas, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 04-10566), 2005 WL 3543087.

21. Kadish, *supra* note 14, at 605.

22. VCCR, *supra* note 1, art 36(1)(a).

23. *Id.* art. 36(1)(b).

24. *Id.* art 36(1)(c).

25. *Id.* art 36(1)(b).

als have claimed that the failure by authorities to notify them of their Article 36 “individual rights” entitles them to judicial remedies in U.S. criminal proceedings. This is the core issue the Supreme Court addressed in *Sanchez-Llamas v. Oregon*.

The reference to foreign nationals’ “rights” in Article 36(1) is inconsistent with the VCCR Preamble, which states that the VCCR was “not [intended] to benefit individuals but to ensure the efficient performance of the functions by consular posts on behalf of their respective States.”<sup>26</sup> Such consular functions include “protecting in the receiving State the interests of the sending State and of its nationals [and] . . . helping and assisting nationals . . . of the sending State.”<sup>27</sup>

Even if Article 36(1) creates individual rights, the VCCR clearly does not provide specific remedies for violations. Rather, Article 36(2) provides that

the rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article [36] are intended.<sup>28</sup>

U.S. courts have been at odds with the ICJ over the proper interpretation of Article 36(2). In the *Case Concerning Avena and Other Mexican Nationals (Avena)*,<sup>29</sup> the ICJ addressed a complaint filed by Mexico alleging Article 36 violations by the United States. When Mexico filed the application instituting proceedings, the ICJ had jurisdiction to bind the United States under the VCCR’s Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol). The Optional Protocol, which the United States ratified as a companion agreement to the VCCR,<sup>30</sup> gave the ICJ compulsory jurisdiction over disputes arising out of the VCCR.<sup>31</sup> The United States argued in *Avena* that Article 36 should be enforced through political and diplomatic channels,

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26. VCCR, *supra* note 1, Preamble.

27. *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2691 (2006) (citing VCCR, *supra* note 1, arts. 5(a), 5(e)).

28. VCCR, *supra* note 1, art 36(2).

29. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

30. *See Sanchez-Llamas*, 126 S. Ct. at 2675.

31. Optional Protocol Concerning the Compulsory Settlement of Disputes art. I, April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

rather than through the courts,<sup>32</sup> and that such enforcement would give “full effect” to the rights as required by Article 36(2). The ICJ rejected this argument and held that the “full effect” provision in Article 36(2) required that courts attach “legal significance” to the violation of Article 36 in a judicial proceeding.<sup>33</sup> After the *Avena* ruling, the United States withdrew from the Optional Protocol, leaving U.S. courts to determine how to enforce Article 36.

In *Sanchez-Llamas*, the Supreme Court granted certiorari to decide:

- (1) whether Article 36 of the Vienna Convention grant[ed] rights which may be invoked by individuals in a judicial proceeding;
- (2) whether suppression of evidence is a proper remedy for a violation of Article 36; and (3) whether an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial.<sup>34</sup>

The first two issues were raised in *State v. Sanchez-Llamas*,<sup>35</sup> where the defendant made incriminating statements without being informed of his right to contact the Mexican Consulate. The trial court denied his Article 36 motion to suppress the statements, and the Supreme Court of Oregon upheld the denial, finding Article 36 does not create individually enforceable rights.<sup>36</sup> The third issue arose in *Bustillo v. Johnson*,<sup>37</sup> after the defendant, a Honduran national, alleged for the first time in his state habeas corpus petition that an Article 36 violation deprived him of evidence crucial to his defense. The state habeas court dismissed the Article 36 claim,<sup>38</sup> and the Supreme Court of Virginia denied his appeal. The two cases, both arising under Article 36 of the Vienna Convention on Consular Relations, were joined and a joint opinion was issued due to similar issues and subject matter.

In the resulting decision, a five-Justice majority—Justice Roberts writing, joined by Justices Scalia, Kennedy, Thomas, and Alito, with Justice Ginsberg concurring in the judgment—held that “even assuming [Article 36] creates judicially enforceable rights . . . suppression is not an appropriate remedy for a violation of Article 36.”<sup>39</sup> Further, it held “a

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32. See Verbatim Record: Public Sitting Held Jan. 21, 2003, 6:00 p.m., Case Concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)* (argument of William H. Taft IV), available at [http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus\\_icr2003-04\\_20030121.PDF](http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus_icr2003-04_20030121.PDF).

33. See *Avena*, 2004 I.C.J. 12, ¶ 113.

34. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2677 (2006).

35. 108 P.3d 573 (Or. 2005).

36. *Id.* at 575–76.

37. 63 Va. Cir. 125 (2003).

38. See *Bustillo v. Johnson*, 65 Va. Cir. 69 (2004).

39. *Sanchez-Llamas*, 126 S. Ct. at 2674.

State may apply its regular rules of procedural default to Article 36 claims.”<sup>40</sup>

The majority did not adopt the ICJ’s interpretation of Article 36(2). Rather, it held that because Article 36(2) provides that Article 36 rights are to “be exercised in conformity with the laws and regulations of the receiving State,” “legal significance” could be attached to Article 36 violations only under a relevant provision of domestic law.<sup>41</sup> Where the ICJ looked first to Article 36(2) and determined that legal significance must be attached to every Article 36 violation, the *Sanchez-Llamas* majority looked first to domestic law to determine whether legal significance would attach to any given violation. Under the majority’s interpretation, the “full effect” requirement is satisfied so long as domestic law provides an avenue of relief for some violations and does not render Article 36 completely inoperative. Although the *Sanchez-Llamas* majority does not foreclose all relief for Article 36 violations, the availability of relief in the future apparently will be limited and likely will be contingent on a foreign national’s ability to support claims for which judicial remedies are already available under domestic law.

Justice Breyer’s dissent—joined by Justices Stevens and Souter, with Justice Ginsberg joining on the question of individual rights under Article 36—adopted the ICJ’s interpretation of Article 36(2) and argued that “full effect” meant that domestic laws and regulations were required to attach legal significance to all Article 36 violations.<sup>42</sup> The *Sanchez-Llamas* majority, however, expressly provided three means of vindicating Article 36 rights: first, for defendants raising Article 36 claims at trial, “a court can make appropriate accommodations to ensure the defendant secures, to the extent possible, the benefits of consular assistance.”<sup>43</sup> Second, “[d]iplomatic avenues—the primary means of enforcing the [VCCR]—also remain open.”<sup>44</sup> Third, “[a] defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police.”<sup>45</sup>

This Article analyzes the *Sanchez-Llamas* decision and attempts to ascertain its impact on future Article 36 litigation. Part II specifically discusses the implications of *Sanchez-Llamas* on previous interpretations of Article 36 by domestic and international tribunals. Part III undertakes an analysis of the majority and dissenting opinions. Finally, Part IV examines the means of vindicating Article 36 rights provided by the

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40. *Id.*

41. *Id.* at 2688.

42. *Id.* at 2702.

43. *Id.* at 2681.

44. *Id.*

45. *Id.*



*Sanchez-Llamas* majority, and considers which remedies will be available for future Article 36 violations.

## II. DECISIONS PRIOR TO *SANCHEZ-LLAMAS V. OREGON*

The majority decision in *Sanchez-Llamas* includes several holdings at odds with international precedents and ensures that the positions of the United States and the international community with regard to Article 36 will remain adversarial. The majority avoided deciding whether Article 36 creates individual rights, finding instead that there were no adequate domestic remedies, and hence, no need to reach the question of individual rights. It also decided that states may apply their regular procedural default rules to Article 36 claims. Each of these holdings places U.S. law at odds with the decisions of other courts.

### A. *International Opinions*

Unlike the Supreme Court in *Sanchez-Llamas*, international tribunals have interpreted Article 36 as providing an individual right which, if violated, requires remediation. The Inter-American Court of Human Rights issued an Advisory Opinion sought by Mexico against the United States in 1999, finding that Article 36 created individual rights, and that the United States violated those rights, prejudicing the due process rights of certain Mexican nationals under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).<sup>46</sup> It also found that foreign nationals subject to such violations are entitled to “reparations.”<sup>47</sup>

*Sanchez-Llamas* is especially antagonistic to the ICJ, which has issued two substantive rulings on Article 36 violations by the United States since the Advisory Opinion of the Inter-American Court condemned the conduct of the United States. In the *LaGrand Case*,<sup>48</sup> six years before the Supreme Court decided *Sanchez-Llamas*, the ICJ found that application of procedural default rules to some Article 36 claims violated Article 36(2). The ICJ found that Article 36(1) creates individual rights to consular notification and access to consulates that are enforceable by individual defendants.<sup>49</sup> Giving “full effect” to these rights would require that a court attach legal significance to the violation

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46. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 121–24 (Oct. 1, 1999).

47. *Id.* ¶ 137.

48. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

49. *Id.* ¶ 77.

of Article 36.<sup>50</sup> Under the ICJ's interpretation, procedural default rules violate Article 36(2) if 1) authorities did not comply with Article 36(1) notification provisions, and 2) the default "does not allow the detained individual to challenge a conviction and sentence [based on an Article 36 violation]."<sup>51</sup> The appropriate remedy in such cases is "review and reconsideration" of the procedurally defaulted claim.<sup>52</sup>

In *Avena*, the ICJ clarified its position on procedural default, holding that "review and reconsideration" must occur in a judicial proceeding that attaches "legal significance" to the violation of Article 36.<sup>53</sup> By holding that "a State may apply its regular rules of procedural default to Article 36 claims,"<sup>54</sup> the Supreme Court in *Sanchez-Llamas* disregarded the ICJ's interpretation of both Article 36 and the issue of procedural default.

The *Avena* judgment did not establish a specific remedy for Article 36 violations,<sup>55</sup> leaving the question open to "examin[ation] under the concrete circumstances of each case by the United States courts . . . ."<sup>56</sup> The ICJ found that the Article 36(1) provision for notification "without delay" requires notification "once it is realized that the person is a foreign national . . . ,"<sup>57</sup> and not immediately upon arrest. This analysis lends support to the Supreme Court's determination that suppression of statements to police is not an appropriate remedy for Article 36 violations.<sup>58</sup> However, the ICJ found that some remedy was required if an Article 36 violation "in the causal sequence of events, ultimately led to convictions and severe penalties . . . ."<sup>59</sup> Under the interpretation of Article 36(2) adopted by the *Sanchez-Llamas* majority, relief is not available for every Article 36 violation, even if the violation "ultimately led to [a] conviction[] . . . ."<sup>60</sup> Thus, the majority also disregarded the ICJ's interpretation of Article 36 with regard to remedies.

U.S. courts have gained notoriety in the international community for their continuing defiance of rulings by international tribunals that have concluded that Article 36 conveys an individual enforceable right for

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50. *Id.* ¶ 96.

51. *Id.* ¶ 90.

52. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, ¶ 121 (Mar. 31).

53. *Id.* ¶ 133.

54. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2674 (2006).

55. See *Avena*, 2004 I.C.J. 12, ¶¶ 120–22.

56. *Id.* ¶ 127.

57. *Id.* ¶ 63.

58. *Sanchez-Llamas*, 126 S. Ct. at 2697.

59. *Avena*, 2004 I.C.J. 12, ¶ 122.

60. *Id.*

detained foreign nationals.<sup>61</sup> In *Sanchez-Llamas*, the Supreme Court validated this defiance.

### B. Domestic Opinions

*Sanchez-Llamas* is generally consistent with domestic Article 36 jurisprudence and will not overrule any circuit court decisions addressing Article 36. It does, however, raise questions about the validity of some aspects of previous decisions, and it endorses limited remediation.

Before *Sanchez-Llamas*, the Federal Circuit Courts were split on the question of whether Article 36 created individual rights. Like the *Sanchez-Llamas* majority, the First,<sup>62</sup> Fourth,<sup>63</sup> Eighth,<sup>64</sup> Ninth,<sup>65</sup> Tenth,<sup>66</sup> and Eleventh<sup>67</sup> Circuit Courts of Appeals declined to decide this question and rejected Article 36 claims on other grounds. The Fifth<sup>68</sup> and Sixth<sup>69</sup> Circuits found that Article 36 did not create individual rights, but the Seventh Circuit reached the opposite conclusion, holding that Article 36 created an individually enforceable right that can serve as the basis for a private civil action.<sup>70</sup>

The Circuit Courts were more unified in their treatment of suppression as a remedy for Article 36 violations. Prior to *Sanchez-Llamas*, the First,<sup>71</sup> Fifth,<sup>72</sup> Sixth,<sup>73</sup> Seventh,<sup>74</sup> Eighth<sup>75</sup>, Ninth,<sup>76</sup> Tenth,<sup>77</sup> and Eleventh<sup>78</sup> Circuits held that suppression is not an appropriate remedy. The majority of state courts have also held that Article 36 violations cannot be remedied through suppression of evidence.<sup>79</sup> *Sanchez-Llamas* expressly

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61. See Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: The International Court of Justice in Mexico v. United States (Avena) Speaks Emphatically to the Supreme Court of the United States About the Fundamental Nature of the Right to Consul*, 36 GEO. J. INT'L L. 1 (2004).

62. *United States v. Li*, 206 F.3d 56 (1st Cir. 2000).

63. See, e.g., *United States v. Zhang*, 217 F.3d 843 (Table) (4th Cir. 2000).

64. *United States v. Ortiz*, 315 F.3d 873 (8th Cir. 2002).

65. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000).

66. *United States v. Contreras-Cortez*, 41 F. App'x 252 (10th Cir. 2002).

67. *United States v. Duarte-Acero*, 296 F.3d 1277 (11th Cir. 2002).

68. See *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001).

69. See *United States v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001).

70. *Jogi v. Voges*, 425 F.3d 367, 382 (7th Cir. 2005).

71. *United States v. Li*, 206 F.3d 56 (1st Cir. 2000).

72. *Jimenez-Nava*, 243 F.3d at 199.

73. *Emuegbunam*, 268 F.3d at 391.

74. *United States v. Chaparrao-Alcantara*, 226 F.3d 616, 618, 621 (7th Cir. 2000).

75. *United States v. Ortiz*, 315 F.3d 873, 888 (8th Cir. 2002).

76. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000).

77. *United States v. Contreras-Cortez*, 41 F. App'x 252 (10th Cir. 2002).

78. *United States v. Duarte-Acero*, 296 F.3d 1277 (11th Cir. 2002).

79. See, e.g., *State v. Cabrera*, 387 N.J. Super. 81 (Super. Ct. App. Div. 2006); *People v. Salgado*, 852 N.E.2d 266 (Ill. App. Ct. 2006); *Sorto v. State*, 173 S.W.3d 469 (Tex. Crim. App. 2005).

upholds these decisions, and strongly supports other opinions denying judicial remedies for Article 36 violations. For example, the Courts of Appeals for the First,<sup>80</sup> Second,<sup>81</sup> Sixth,<sup>82</sup> and Eleventh<sup>83</sup> Circuits have held that dismissal of the indictment is also not an appropriate remedy for Article 36 violations, and these holdings are consistent with *Sanchez-Llamas*.

*Sanchez-Llamas* does, however, raise questions about the Fourth Circuit's holding in *United States v. Beckford*. In *Beckford*, the defendant alleged an Article 36 violation based on the trial court's refusal to grant a continuance after the defendant learned of his Article 36 rights at trial.<sup>84</sup> Although the Fourth Circuit denied relief without addressing whether the trial court erred by denying the continuance, the trial court's decision was likely erroneous under *Sanchez-Llamas*. The *Sanchez-Llamas* majority expressly provided that a trial court should "make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance."<sup>85</sup> In the future, refusals by trial courts to make such accommodations should be reviewed for abuse of discretion. Thus, the Fourth Circuit in *Beckford* may have failed to correct an error by the trial court.

*Sanchez-Llamas* also raises questions about the analyses applied by some courts in rejecting Article 36 claims. Prior to *Sanchez-Llamas*, the Fourth Circuit assumed, without deciding, that suppression and other remedies were available for Article 36 violations, but it rejected Article 36 claims based on the failure to show prejudice from any alleged violation.<sup>86</sup> The Tenth Circuit in *United States v. Cazares*,<sup>87</sup> and the Eleventh Circuit in *United States v. Cordoba-Mosquera*,<sup>88</sup> also applied the prejudice analysis in rejecting Article 36 claims. Although *Sanchez-Llamas* does not specifically overrule the ultimate holdings in these cases, its determination that suppression is never an appropriate remedy for an Article 36 violation will compel all courts to reject future suppression cases based on Article 36 claims without resorting to a prejudice analysis.

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80. See *United States v. Li*, 206 F.3d 56 (1st Cir. 2000).

81. *United States v. De la Pava*, 268 F.3d 157 (2d Cir. 2001).

82. See *United States v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001).

83. See *Duarte-Acero*, 296 F.3d at 1277.

84. No. 97-4926, 2000 WL 376155, at \*13 (4th Cir. May 3, 2000).

85. *Sanchez-Llamas*, 126 S. Ct. at 2682.

86. See, e.g., *U.S. v. Zhang*, 217 F.3d 843 (4th Cir. 2000) (unpublished table decision).

87. 60 F. App'x 223 (10th Cir. 2003).

88. 212 F.3d 1194 (11th Cir. 2000).

### III. *SANCHEZ-LLAMAS V. OREGON AND BUSTILLO V. JOHNSON* MAJORITY AND DISSENT

The holding in *Sanchez-Llamas*, while silent about whether Article 36 creates individual rights, suggests that an affirmative answer to this question may be forthcoming if the Court finds it necessary to address it in the future. The decision also has serious implications for both suppression of detainees' statements made without the protections Article 36 affords and the question of procedural default. This section analyzes the Court's decision and Justice Breyer's dissent on each of these subjects.

#### A. *Individual Rights*

Success on any Article 36 claim is contingent on a finding that Article 36 creates individual rights. The *Sanchez-Llamas* majority declined to decide whether Article 36 creates individual rights, concluding instead that the petitioners were "not in any event entitled to relief on their claims."<sup>89</sup> Although *Sanchez-Llamas* did not expressly hold that Article 36 creates individual rights, certain aspects of the decision suggest that such a right exists.

Some support for the view that the Court would find such rights can be derived from dicta in *Breard v. Greene*.<sup>90</sup> Confusion about whether Article 36 creates an individual right of enforcement stems largely from the "obvious tension between the broad language of the clause in the [VCCR] Preamble that appears to disclaim any general intent to protect individuals, and the language of Article 36,"<sup>91</sup> which refers to the "rights" of foreign nationals. Although the Supreme Court has not expressly ruled on these arguments, the Court stated in *Breard* that Article 36 "arguably confers on an individual the right to consular assistance . . . ."<sup>92</sup>

Further support for the proposition that the Court may one day decide that Article 36 creates individual rights can be gleaned from considering *Sanchez-Llamas* in conjunction with the Supreme Court's recent ruling in *Hamdan v. Rumsfeld*,<sup>93</sup> issued only one day after *Sanchez-Llamas*. Justices Kennedy, Breyer, Ginsburg, Stevens, and Souter formed the majority in *Hamdan*, declining to decide whether Common Article 3 of the Geneva Conventions (Common Article 3) "[furnishes the] petitioner with any enforceable right."<sup>94</sup> Unlike Article 36, Common Article 3 does not expressly refer to the "rights" of individuals in deten-

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89. 126 S. Ct. at 2678.

90. 523 U.S. 371 (1998).

91. *Jogi v. Voges*, 425 F.3d 367, 375 (7th Cir. 2005).

92. *Breard*, 523 U.S. at 376.

93. 126 S. Ct. 2749 (2006).

94. *Id.* at 2794.

tion, but rather provides that the parties to an "armed conflict not of an international character . . . [are] prohibited at any time and in any place . . . [from] the passing of sentences . . . without previous judgment pronounced by a regularly constituted court . . . ." <sup>95</sup> Nonetheless, it is likely that the five members of the *Hamdan* majority favor finding individual rights under Common Article 3.

Dissenting in *Hamdan*, Justices Scalia, Thomas, and Alito found that Common Article 3 does not create individual rights, based on a footnote from the Supreme Court's 1950 ruling in *Johnson v. Eisentrager*.<sup>96</sup> The footnote stated that "responsibility for observance and enforcement of [rights under the 1929 Geneva Convention] is upon political and military authorities."<sup>97</sup> Based on this footnote, the dissent found that "diplomatic measures by political and military authorities [are] the exclusive mechanisms" of enforcing the protections in Common Article 3.<sup>98</sup> The dissent used the same reasoning that the District of Columbia Circuit Court of Appeals, joined at the time by current Chief Justice Roberts, applied in its earlier ruling in *Hamdan*. That court found that Common Article 3 does not create individual rights, relying on the aforementioned footnote in *Eisentrager*<sup>99</sup> and the general presumption that "[i]nternational agreements . . . do not create private rights . . . in domestic courts."<sup>100</sup>

The *Hamdan* majority criticized the Court of Appeals for relying only on a statement "[b]uried in a footnote of the [*Eisentrager*] opinion . . . ."<sup>101</sup> The majority referred to the *Eisentrager* footnote as "this curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument . . . ."<sup>102</sup> This strongly suggests that the *Hamdan* majority, unlike the dissent, does not consider *Eisentrager* a barrier to finding that Common Article 3 creates individual rights. The majority ultimately avoided this issue, finding that

[w]hatever else might be said about the *Eisentrager* footnote, it does not control this case. We may assume that . . . [the Geneva Conventions do not furnish the] petitioner with any enforceable

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95. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

96. See *Hamdan*, 126 S. Ct. at 2844–45 (Thomas, J., dissenting).

97. *Id.* (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950)).

98. *Id.* at 2844.

99. *Hamdan v. Rumsfeld*, 415 F.3d 33, 39 (D.C. Cir. 2005).

100. *Id.* at 39 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987)).

101. *Hamdan*, 126 S. Ct. at 2794 (majority opinion).

102. *Id.*

right. For, regardless of the nature of the rights conferred on Hamdan . . . they are . . . part of the law of war.<sup>103</sup>

The majority footnoted this statement with several arguments favoring "the existence of 'rights' conferred in prisoners of war [by Common Article 3],"<sup>104</sup> and it did not cite any sources arguing the contrary position. In sum, the *Hamdan* majority's discussion of individual rights strongly implies that it favors finding individual rights under Common Article 3.

Because VCCR Article 36 expressly refers to "rights" of detained foreign nationals, the case for finding individual rights under Article 36 is even stronger than the case for finding individual rights under Common Article 3. Thus, it is likely that the members of the *Hamdan* majority would favor finding that Article 36, like Common Article 3, creates individual rights. Indeed, Justices Ginsburg, Breyer, Souter, and Stevens have already expressed their support for finding such rights in the *Sanchez-Llamas* dissent. This makes Justice Kennedy the only member of the *Hamdan* majority that has not already found that Article 36 creates individual rights.

Justice Kennedy's concurring opinion in *Hamdan* may explain his reluctance to reach the individual rights question in *Sanchez-Llamas*. In his *Hamdan* concurrence, Justice Kennedy cited *Banco Nacional de Cuba v. Sabbatino* for the proposition that "[t]here should be reluctance . . . to reach unnecessarily"<sup>105</sup> questions of treaty interpretation, where "Congress may choose to provide further guidance in this area."<sup>106</sup> In *Sabbatino*, the Supreme Court recognized that judicial pronouncements on international law should reflect a "proper distribution of functions between the judicial and political branches of the Government. . . . [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . ."<sup>107</sup> However, with regard to issues of international law that touch "more sharply on national nerves,"<sup>108</sup> courts should avoid the "sensitive task of establishing a principle not inconsistent with the national interest or with international justice."<sup>109</sup> Finding that a treaty creates individual rights, when such a finding is unnecessary

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103. *Id.*

104. *Id.* at 2794 n.57 (quoting Int'l Comm. of the Red Cross, 3 *Commentary: Geneva Convention Relative to the Treatment of Prisoners of War* 91 (1960)); see also *id.* at 2794 n.58 (quoting Int'l Comm. of the Red Cross, 1 *Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 84 (1952)).

105. *Hamdan*, 126 S. Ct at 2809, (Kennedy, J., concurring).

106. *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)).

107. *Sabbatino*, 376 U.S. at 427-28.

108. *Id.* at 428.

109. *Id.*

to the ultimate holding, would be contrary to the principle announced in *Sabbatino*.

The question of whether Article 36 creates individual rights certainly qualifies as an issue that touches “sharply on national nerves.” In the current political climate—and given the principle announced in *Sabbatino*—any finding of an individual right under Article 36 should be delayed until it becomes necessary to the ultimate result in a case. This would occur only if a claimant was otherwise entitled to relief on his Article 36 claim—for example, if a defendant successfully “raise[d] an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police.”<sup>110</sup> Justice Breyer, writing for the *Sanchez-Llamas* dissent, implicitly acknowledged the *Sabbatino* principle at the outset of his individual rights argument, stating that “[t]he Court . . . does not decide the [individual rights question] because it concludes in any event that the petitioners are not entitled to the remedies they seek. . . . I would resolve those remedial questions differently. Hence, I must decide, rather than assume, the answer to the . . . question . . . .”<sup>111</sup>

When considered together, *Sanchez-Llamas* and *Hamdan* indicate that the Supreme Court is likely split 4-4 on the question of whether Article 36 creates individual rights.<sup>112</sup> The dissent in *Sanchez-Llamas* establishes that Justices Ginsburg, Souter, Breyer, and Stevens favor finding such a right. However, the positions taken by the D.C. Circuit Court of Appeals and the dissent in *Hamdan* indicate that Justices Thomas, Scalia, Alito, and Roberts favor the general presumption that “[i]nternational agreements. . . do not create private rights. . . in domestic courts,”<sup>113</sup> and thus are not likely to find individual rights under Article 36.

With the positions of eight Justices likely accounted for (and barring subsequent changes in the composition of the Court), the vote of Justice Kennedy should determine whether Article 36 creates individual rights. Because Justice Kennedy joined the *Hamdan* majority opinion, which strongly implied its support for finding individual rights under Common Article 3—and because the case for finding rights under Article 36 is stronger than the case for rights under Common Article 3—it is more

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110. *Id.*

111. *Sanchez-Llamas*, 126 S. Ct. at 2694 (2006).

112. If Justice O'Connor had not retired prior to *Sanchez-Llamas*, this issue may have been decided differently. Dissenting in *Medellin v. Dretke*, 544 U.S. 660 (2005), Justice O'Connor noted, “[t]his Court has repeatedly enforced treaty-based rights of individual foreigners, allowing them to assert claims arising from various treaties,” and “[the] rights conferring language [in those treaties] is arguably no clearer than the Vienna Convention’s is, and they do not specify judicial enforcement.” *Id.* at 686–87.

113. *Hamdan v. Rumsfeld*, 415 F.3d 33, 39 (D.C. Cir. 2005) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987)).



likely than not that he also supports finding individual rights under Article 36, and therefore a majority of the Court would support finding individual rights under Article 36.

The *Sanchez-Llamas* dissent's justification for finding that Article 36 creates rights for individual defendants relied on both domestic and international law.<sup>114</sup> Because the VCCR is a self-executing treaty, which "operates of itself without the aid of any legislative provision,"<sup>115</sup> the Supremacy Clause requires that it "be regarded in courts of justice as equivalent to an act of the legislature."<sup>116</sup> Thus, Article 36 is "the supreme law of the land."<sup>117</sup> Accordingly, the proper methodology for determining whether a treaty incorporates enforceable rights is to look "to the treaty for a rule of decision for the case before it as it would a statute."<sup>118</sup>

The dissent determined that a statute containing the language of Article 36 would clearly be interpreted as creating an individual right. The rights provided in Article 36 do not differ "from other procedural rights that courts commonly enforce," and the provision "speaks directly of the 'rights' of the individual foreign national."<sup>119</sup> Moreover, Article 36(1)(b) refers explicitly to the "person," suggesting an enforceable individual right is incorporated within the language of the Article 36.

The dissent also referred to the decisions of the ICJ in *LaGrand*<sup>120</sup> and *Avena*,<sup>121</sup> both of which "ruled that an arrested foreign national may raise a violation of the arresting authorities' obligation to 'inform [him] without delay of his rights under' Article 36(1) in an American judicial proceeding."<sup>122</sup> The dissent found that the ICJ's interpretation was entitled to "'respectful consideration' . . . [which] counsels in favor of an interpretation that is consistent with the ICJ's reading of the Convention here."<sup>123</sup>

Finally, the dissent responded to two arguments that are commonly raised against finding an individual right. First, the United States has argued that Article 36 rights of consular notification are state rights and

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114. See *Sanchez-Llamas*, 126 S. Ct. at 2690–99.

115. *Id.* at 2694. Justice Breyer is using language from Justice Marshall's opinion in *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

116. *Id.* (again quoting *Foster v. Neilson*).

117. U.S. CONST. art. VI, cl. 2.

118. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2695 (quoting *Head Money Cases*, 112 U.S. 580, 598–99 (1884)).

119. *Id.*

120. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

121. *Case Concerning Avena and other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

122. *Sanchez-Llamas*, 126 S. Ct. at 2696.

123. *Id.* at 2697.

not individual rights,<sup>124</sup> citing the “presumption” that treaties “will be enforced through political and diplomatic channels, rather than through the courts.”<sup>125</sup> The dissent rejected this “presumption” as illusory, and it distinguished the few cases the government provided as support.<sup>126</sup> Although the *Head Money Cases* state that a treaty “depends for the enforcement of its provisions on the interest and . . . honor of the governments which are parties to it,”<sup>127</sup> they also “make clear that a treaty may confer certain enforceable ‘rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other.’”<sup>128</sup> Second, the dissent refused to adopt the executive branch interpretation of Article 36 as creating no individual rights, reasoning that although the interpretation is entitled to “great weight,” it is not conclusive, and could not be adopted where “language, the nature of the right, and the ICJ’s interpretation of the treaty taken separately or together so strongly point to an intent to confer enforceable rights upon an individual.”<sup>129</sup> Based on these considerations, the dissent concluded that the VCCR does, indeed, create judicially enforceable rights, thereby entitling defendants to have their Article 36 claims heard in U.S. courts.

### B. The Suppression Issue

The *Sanchez-Llamas* majority and dissent disagreed on both the source and the extent of remedies available to foreign nationals detained under conditions violating Article 36. The majority, holding that domestic law governed remedies, found that suppression of a detainee’s statements or confession was never an appropriate remedy for Article 36 violations. The dissent found, instead, that the language of the treaty itself dictated a remedy was required, and then found that suppression was appropriate in certain circumstances.

#### 1. Majority Opinion

The majority concluded that the VCCR “does not prescribe specific remedies for violations of Article 36. Rather, [Article 36(2)] expressly leaves the implementation of Article 36 to domestic law.”<sup>130</sup> As a result,

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124. See *LaGrand*, 2001 I.C.J. 466, ¶ 76; Brief for United States as Amicus Curiae Supporting Respondents at 20, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 05-51, 04-10566), 2006 WL 271823.

125. Brief for United States, *supra* note 124, at 11.

126. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2697. The government cited *Charlton v. Kelly*, 229 U.S. 447, 474 (1913); *Whitney v. Robinson*, 124 U.S. 190, 295 (1888); and *Foster v. Neilson*, 27 U.S. 253, 306 (1829). Brief for the United States, *supra* note 124, at 11.

127. 112 U.S. 580, 598 (1884).

128. *Sanchez-Llamas*, 126 S. Ct. at 2697 (quoting *Head Money Cases*, 112 U.S. at 598).

129. *Id.* at 2698.

130. *Id.* at 2678 (majority opinion).

domestic law controls the availability of an exclusionary remedy for Article 36 violations. The petitioner advanced two principal arguments in support of a suppression remedy: 1) under its general supervisory authority, the Supreme Court could impose an exclusionary remedy on state courts, even if the VCCR did not specifically provide such a remedy;<sup>131</sup> and 2) the “full effect” language of Article 36(2) implicitly requires some judicial remedy,<sup>132</sup> and a remedy of suppression is consistent with the broader policies underlying the exclusionary rule.<sup>133</sup>

In rejecting the first argument, the majority found that it possessed no supervisory authority over state courts, and that any authority of the Supreme Court “to develop remedies for the enforcement of federal law”<sup>134</sup> existed only in federal courts.<sup>135</sup> A federal court “creat[ing] a judicial remedy applicable in state courts”<sup>136</sup> would be engaging in “lawmaking of [its] own.”<sup>137</sup> Thus, only the VCCR itself could authorize an exclusionary remedy for Article 36 violations.

The majority also found that the “full effect” language in Article 36(2) did not “implicitly require”<sup>138</sup> an exclusionary remedy. The majority expressed doubt that Article 36 ever required a judicial remedy in a criminal prosecution, and noted that no other country has interpreted Article 36 as providing a remedy in criminal cases.<sup>139</sup> Even if a judicial remedy was required, the Court continued, it would not support a finding of exclusion. Rather, Article 36(2) simply requires that any remedy conform “with the laws and regulations of the receiving State.”<sup>140</sup>

For the majority, suppression would be a “vastly disproportionate” remedy for Article 36 violations.<sup>141</sup> Regardless of whether “the failure to inform defendants of their right to consular notification [gave] them ‘a misleadingly incomplete picture of [their] legal options,’ . . . other constitutional and statutory protections—many of them already enforced by the exclusionary rule—safeguard the same interests Sanchez-Llamas claims are advanced by Article 36.”<sup>142</sup> Further, the Court noted that ap-

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131. Brief for Petitioner Moises Sanchez-Llamas at 39, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 04-10566), 2005 WL 3598178.

132. *Id.*

133. *Id.* at 44.

134. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2679.

135. This result indicates the Court does have the authority to impose an Article 36 remedy on federal courts. However, the *Sanchez-Llamas* opinion offers no indication that the Court would actually be inclined to use its authority to impose such a remedy.

136. *Sanchez-Llamas*, 126 S. Ct. at 2671.

137. *Id.* at 2680.

138. *Id.*

139. *Id.*

140. *Id.* (quoting VCCR, *supra* note 1, art. 36(2)).

141. *Id.* at 2681.

142. *Id.* at 2681–82 (quoting Brief for Petitioner, *supra* note 131, at 42).

plying the exclusionary rule to Article 36 violations would be inconsistent with the rule's general application to the fruits of unconstitutional searches, seizures, and interrogations, where Article 36 compliance is not even required at the time most searches and interrogations occur.<sup>143</sup>

Finally, the majority noted that "suppression is not the only means of vindicating Vienna Convention rights. A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police."<sup>144</sup> In her concurring opinion, Justice Ginsburg agreed that a suppression remedy could not be implied from the "full effect" language in Article 36(2). Rather, the possibility that a defendant, "in fitting circumstances," might successfully raise an Article 36 claim in voluntariness challenges gives "full effect" to Article 36 "in a manner consistent with U.S. rules and regulations."<sup>145</sup>

## 2. Dissenting Opinion

While the majority looked to domestic law to determine whether a suppression remedy is available, the dissent concluded that some remedy is available based on the treaty language in Article 36(2). The only role of domestic law, they found, should be to determine which remedy should be applied. Under the dissent's interpretation of Article 36(2), only a judicial remedy can satisfy the "full effect" requirement, which domestic law must accommodate. This is a natural extension of the ICJ's interpretation of the "full effect" language as requiring that "legal significance" be attached to an Article 36 violation.

The dissent agreed that automatic exclusion, as would be required if authorities violated a defendant's *Miranda* rights,<sup>146</sup> was not always appropriate for Article 36 violations. However, the dissent did argue that exclusion should be used when it is the only effective remedy available.<sup>147</sup> The dissent agreed with the majority and concurrence in assessing Article 36 violations in the context of voluntariness challenges,<sup>148</sup> but it maintained that such an analysis will not always lead to an effective remedy.

The dissent also dismissed as unfounded the majority's claim that suppression would not be offered as a remedy in the 169 other countries that are parties to the VCCR,<sup>149</sup> noting that in general, suppression of

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143. *Id.*

144. *Id.* at 2682.

145. *Id.* at 2689 (Ginsburg, J., concurring).

146. *Miranda v. Arizona*, 384 U.S. 436, 471 (1966).

147. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2706 (Breyer, J., dissenting).

148. *Id.* at 2707-08.

149. *Id.* at 2708-09. See also *Dickerson v. United States*, 530 U.S. 428, 433 (2000); *Tan Seng Kiah v. Queen* (2001) 160 F.L.R. 26 (Ct. Crim. App. N. Terr.) (Austl.) (using suppres-

wrongfully obtained evidence is available as a remedy in many other countries, and its origin is actually in English common law, not American law, as claimed in Justice Roberts' opinion.<sup>150</sup> Because "the criminal justice systems of different nations differ in important ways,"<sup>151</sup> the VCCR could not have listed specific remedies. The dissent interpreted the "full effect" language in Article 36(2) as insisting upon effective remedies and requiring that where suppression is the only means of providing an effective remedy, it must be applied.

### C. Procedural Default

The *Sanchez-Llamas* majority and dissent also disagreed on the effect of procedural default rules on Article 36 claims. The majority found that detainees raising Article 36 claims should not be exempted from procedural default requirements despite the additional hardship they may suffer because of the treaty violation. The dissent found that the treaty claims should trump procedural default rules when there is no other way to raise the claim and the Article 36 violation was itself the reason the claim was not raised appropriately.

#### 1. Majority Opinion

The majority held that the procedural default rule could be applied to the *Bustillo v. Johnson* defendant's Article 36 claim, in direct contravention of the ICJ's holding in *Avena*.<sup>152</sup> The majority found no basis to depart from its previous holding in *Breard*.<sup>153</sup> That decision provided three reasons for rejecting Breard's contention that Article 36 trumped federal procedural default rules: 1) it is widely recognized in international law that "absent a clear and express statement to the contrary, the procedural rules of the forum state govern the implementation of the treaty in that state;"<sup>154</sup> 2) Article 36 rights should be construed in conformity with the laws of the receiving state; and 3) the federal procedural default rule was enacted after Article 36, and thus "superseded any inconsistent provision in the [VCCR]."<sup>155</sup>

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sion); *Queen v. Tan* (2001) W.A.S.C. 275 (Sup. Ct. W. Austl.) (considering suppression as a remedy); *Regina v. Partak*, 160 C.C.C.3d 553 at para. 63 (2001) (Ont. Super. Ct. J.) (considering suppression as a remedy).

150. *Sanchez-Llamas*, 126 S. Ct. at 2706.

151. *Id.*

152. *Case Concerning Avena and other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, ¶¶ 112–13 (Mar. 31).

153. *Breard v. Greene*, 523 U.S. 371 (1998).

154. *Id.* at 375–76.

155. *Sanchez-Llamas*, 126 S. Ct. at 2703 (citing *Breard*, 523 U.S. at 376).

The majority refused to distinguish *Bustillo* on the basis that it involved a state procedural rule rather than a federal procedural rule, noting that the federal-state distinction was not relevant in the *Breard* procedural default analysis. Concurring in *Sanchez-Llamas*, Justice Ginsburg wrote that “it would be unseemly . . . for this Court to command state courts to relax their identical, or even less stringent procedural default rules, while federal courts operate without constraint in this regard.”<sup>156</sup> The majority also refused to exempt Article 36 claims from procedural default requirements on the basis that such claims “are most appropriately raised post-trial or on collateral review.”<sup>157</sup> The majority accordingly held that a state could apply its ordinary procedural default rules to Article 36 claims.

Most importantly, the majority refused to invalidate *Breard* based on the ICJ’s holding in *Avena* that application of procedural default rules to some Article 36 claims violated the “full effect” language of Article 36(2).<sup>158</sup> The majority found that, although the ICJ’s interpretation of Article 36(2) was entitled to “respectful consideration,”<sup>159</sup> *Avena* was not binding on U.S. Courts, where “[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.”<sup>160</sup> The Optional Protocol could not supersede the Supreme Court’s constitutional authority to decide the issue. Further, the United States’ withdrawal from the Optional Protocol after *Avena* was evidence that the government did not intend for ICJ precedent to bind United States courts.<sup>161</sup>

The majority proceeded to find that the ICJ’s interpretation “overlook[ed] the importance of procedural default rules in an adversary system, which relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate

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156. *Id.* at 2689 (Ginsburg, J., concurring).

157. Brief for Petitioner Mario A. Bustillo at 39, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 05-51), 2005 WL 3597704. The brief cited *Massaro v. United States*, 538 U.S. 500 (2003), which held that ineffective assistance of counsel claims may be raised for the first time in a federal habeas corpus petition; requiring otherwise would force defendants to raise such claims prior to developing an adequate factual basis. Although *Sanchez-Llamas* does not foreclose this argument in federal habeas proceedings, the *Sanchez-Llamas* majority determined that, although a defendant may not become aware of the legal basis for an Article 36 claim until after trial, the factual basis exists prior to trial. *Sanchez-Llamas*, 126 S. Ct. at 2687. Thus, any attempt to raise this argument in a federal proceeding is unlikely to meet with success.

158. See VCCR, *supra* note 1, art. 36(2).

159. *Sanchez-Llamas*, 126 S. Ct. at 2685 (majority opinion).

160. *Id.* at 2684.

161. *Id.* at 2685.

time for adjudication.”<sup>162</sup> The Court noted that under the ICJ’s interpretation,

Article 36 claims could trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication . . . . This sweeps too broadly, for it reads the “full effect” proviso in a way that leaves little room for Article 36’s clear instruction that Article 36 rights “shall be exercised in conformity with the laws and regulations of the receiving State.”<sup>163</sup>

Exempting Article 36 claims from procedural default rules would violate domestic law, which subjects even *Miranda* claims to procedural default requirements.<sup>164</sup>

In concurrence, Justice Ginsburg agreed that “it would be extraordinary to hold that defendants, unaware of their *Miranda* rights because the police failed to convey the required warnings, would be subject to a State’s procedural default rules, but defendants not told of Article 36 rights would face no such hindrance.”<sup>165</sup> In addition, Justice Ginsburg noted that procedural default on an Article 36 claim could support a larger showing of ineffective assistance of counsel, in which case “‘full effect’ could . . . [be] given to Article 36, without dishonoring state procedural rules that are compatible with due process.”<sup>166</sup>

## 2. Dissenting Opinion

The dissent concluded that Article 36 should take precedence over state procedural law when two circumstances are met simultaneously: (1) when “the defendant’s failure to raise a Convention matter (e.g., that police failed to inform him of his Article 36 rights) can be traced to the failure of the police (or other governmental authorities) to inform the defendant of those Convention rights,”<sup>167</sup> and (2) when “state law does not provide any other effective way for the defendant to raise that issue (say, through a claim of ineffective assistance of counsel).”<sup>168</sup> The dissent provided three reasons for coming to this conclusion. First, in order to give full effect to the provisions of the VCCR and to interpret it such that it conforms with the laws of the United States, the dissent concluded that Article 36 must trump state procedural rules when the two criteria set

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162. *Id.*

163. *Id.* at 2686 (quoting VCCR, *supra* note 1, art. 36(2)).

164. *Id.* at 2687.

165. *Id.* at 2689 (Ginsburg, J., concurring).

166. *Id.* at 2690 n.3.

167. *Id.* at 2698 (Breyer, J., dissenting).

168. *Id.*

forth above are met.<sup>169</sup> Second, the drafting history of the Convention shows that “full effect” means much more than preventing domestic law from nullifying Article 36.<sup>170</sup> While the original phrasing stated that domestic law should “not nullify” the rights of the Convention, this phrase was later replaced with an amendment requiring parties to the Convention to give “full effect” to the rights of the VCCR. The dissent claimed that such a shift in vocabulary requires an affirmative effort to give such rights full effect if domestic law stands in the way.<sup>171</sup>

Finally, the dissent found that the majority misinterpreted the ICJ’s views in *Avena* and *LaGrand* on the effect of default rules on Article 36 claims. It argued that the ICJ’s opinions require only that the VCCR bypass procedural default rules when there is no other effective remedy, and when the remedy is unavailable due to the failure of U.S. authorities to observe the mandates of Article 36. The dissent concluded that the majority’s “reluctance to give *LaGrand* and *Avena* this perfectly reasonable interpretation reflects a failure to provide in practice the ‘respectful consideration’ that we all believe the law demands.”<sup>172</sup>

The dissent also criticized the majority’s reliance on *Breard*, which it maintained could be distinguished on the basis that it addressed federal, rather than state, procedural default rules. Unlike the majority, the dissent found “no anomaly in treating state law differently from federal law for these purposes.”<sup>173</sup> Thus, allowing Article 36 to overrule state procedural rules would not violate *Breard*’s precedent.<sup>174</sup> The ICJ’s opinions in both *Avena* and *LaGrand*, which were issued by the ICJ after the Supreme Court published its *Breard* opinion, give further support to this position. The dissent agreed with the ICJ’s determinations in *Avena* and *LaGrand* that state procedural default rules must sometimes give way to the rights set forth by the VCCR, and that reaching this result “requires no more than reading an exception into *Breard*’s language.”<sup>175</sup> In light of these considerations, the dissent believed there was enough support to remand *Bustillo* to the Virginia court for consideration on the merits of Bustillo’s underlying claim.

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169. *Id.*

170. *Id.* at 2698–99.

171. *Id.* See also Int’l Law Comm’n, Draft Articles on Consular Relations, art. 36(2), 13th Sess., reprinted in LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 237 (1966); United Nations Conference on Consular Relations, Official Records, Summary records of plenary meetings and of the meetings of the First and Second Committees, ¶¶ 26, 30, U.N. Doc. A/CONF.25/16 (1963).

172. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2703.

173. *Id.* at 2704.

174. *Id.*

175. *Id.*



## IV. REMEDIES

## A. Judicial Remedies

The *Sanchez-Llamas* majority expressed “doubt” that Article 36 requires any “judicial remedy in . . . criminal prosecutions.”<sup>176</sup> Further, under the majority’s interpretation of Article 36(2), any remedy for an Article 36 violation must exist within domestic law.<sup>177</sup> Thus, the same reasoning used to preclude suppression as a remedy would also apply to other remedies commonly sought for Article 36 violations, such as dismissal of the indictment.<sup>178</sup> Under domestic law, dismissal of the indictment as a remedy is applied even more restrictively than the exclusionary rule, where “[s]o drastic a step . . . [would] increase to an intolerable degree interference with the public interest in having the guilty brought to book.”<sup>179</sup> If an Article 36 violation does not merit suppression, it is highly unlikely that dismissal of the indictment is available as a remedy.

## 1. Voluntariness

Although judicial remedies may not be available for an Article 36 violation as specifically set forth in the VCCR, the *Sanchez-Llamas* majority expressly provided that “a defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police.”<sup>180</sup> However, “Article 36 has nothing whatsoever to do with searches or interrogations,”<sup>181</sup> and “[i]n most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police.”<sup>182</sup> Thus, the majority implied that voluntariness challenges will rarely be a basis of relief for Article 36 violations. However, the majority also noted that many “constitutional and statutory protections . . . safeguard the same interests *Sanchez-Llamas* claims are advanced by Article 36.”<sup>183</sup> Foreign nationals who are unable to obtain relief from Article 36 violations may still use such protections to address any underlying harm caused by language or cultural barriers.

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176. *Id.* at 2680 (majority opinion).

177. *Id.*

178. As indicated *supra* text accompanying notes 80–83, many circuits have already barred dismissal as a remedy.

179. *United States v. Blue*, 384 U.S. 251, 255 (1966).

180. *Sanchez-Llamas*, 126 S. Ct. at 2682.

181. *Id.* at 2681.

182. *Id.*

183. *Id.* at 2682.

The majority's statement that an Article 36 violation can be raised as part of a "challenge to the voluntariness of . . . statements to police,"<sup>184</sup> refers to the Fifth Amendment privilege against coerced or involuntary confessions.<sup>185</sup> To evaluate the voluntariness of confessions by criminal defendants, state and federal courts "examine the 'totality of the circumstances' to discover if the confessor's will was overborne."<sup>186</sup> Voluntariness determinations rarely turn on "the absence or presence of a single . . . criterion."<sup>187</sup> Rather, each "reflect[s] careful scrutiny of all the surrounding circumstances,"<sup>188</sup> including:

the youth of . . . the accused . . . ; his lack of education . . . ; or his low intelligence . . . ; the lack of any advice to the accused of his constitutional rights . . . ; the length of the detention . . . ; the repeated and prolonged nature of the questioning . . . ; and the use of physical punishment such as the deprivation of food or sleep . . . .<sup>189</sup>

In addition, as a "necessary predicate to finding that a confession is not 'voluntary,'"<sup>190</sup> there must be active governmental misconduct,<sup>191</sup> which is causally related to the decision to confess.<sup>192</sup>

After *Sanchez-Llamas*, Article 36 claims should be included in the totality of the circumstances test applied by state and federal courts to determine whether "a confessor's will was overborne."<sup>193</sup> The test should incorporate both the violation of Article 36 by authorities and any underlying harm caused by language or cultural barriers. Unlike challenges related to the waiver of constitutional rights, voluntariness determinations depend on "the level of police coercion,"<sup>194</sup> rather than "the defendant's mental state."<sup>195</sup> The violation of Article 36 by authorities can be raised to demonstrate the element of coercion in a voluntariness challenge.

184. *Id.*

185. *Smith v. Duckworth*, 856 F.2d 909, 912 (7th Cir. 1988). See also *Columbe v. Connecticut*, 367 U.S. 568 (1961); *United States v. Cody*, 114 F.3d 772 (8th Cir. 1997); *Frazier v. Cupp*, 394 U.S. 731 (1969); *Illinois v. Perkins*, 496 U.S. 292 (1990); and *Dickerson v. United States*, 530 U.S. 428 (2000) for instances where courts have invoked the totality of the circumstances test for involuntary confessions.

186. *Smith*, 856 F.2d at 912.

187. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

188. *Id.*

189. *Id.*

190. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

191. *Id.*

192. *Id.* at 164.

193. *Smith v. Duckworth*, 856 F.2d 909, 912 (1988).

194. *Id.* at 913.

195. *Id.* at 912-13.

An example of an Article 36 claim raised “as part of a broader challenge to the voluntariness of . . . statements to . . . police”<sup>196</sup> is found in Sanchez-Llamas’ Petition for Writ of Certiorari. The totality of the circumstances in this challenge included the fact that Sanchez-Llamas came from “an area in Mexico where people greatly fear the police and do not believe that they can refuse to answer police questions,”<sup>197</sup> and that understanding his *Miranda* warnings “required an 8th or 9th grade level of education . . . [and that] petitioner had poor language skills in his native language.”<sup>198</sup> In addition, the violation of Article 36 was raised to demonstrate deliberate “police misconduct.”<sup>199</sup> Sanchez-Llamas claimed that by violating his Article 36 rights, the police deprived him of “the very procedures that were established to ensure that he understood his rights in the American criminal justice system.”<sup>200</sup>

Including Article 36 violations in the totality of the circumstances may increase the likelihood of obtaining relief for some foreign nationals. In *Sosa v. Dretke*, a foreign defendant raised a voluntariness challenge alleging that his limited knowledge of the English language, his submissive personality, and his mental impairment rendered his statements to police involuntary.<sup>201</sup> The Fifth Circuit denied relief on the basis that the defendant offered no evidence that governmental misconduct impacted his decision to confess.<sup>202</sup> If the defendant in *Sosa* had raised an Article 36 violation as evidence of governmental misconduct, however, his challenge may have been successful.

A trial judge in a Georgia death penalty case involving a Mexican national ruled that Article 36 does not create individual rights, but at the same time recognized the importance of Article 36 violations by giving a jury instruction that such violations are to be considered in the totality of the circumstances test.<sup>203</sup> The charge stated:

[I]ndividual treaties do not create individual rights which are privately enforceable in court proceedings. Any failure by the police to inform Defendant of his rights under this treaty would not, by itself, make his statement involuntary. You may or may not, in your discretion, consider this evidence along with all the

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196. *Sanchez-Llamas*, 126 S. Ct. at 2682.

197. Petition for Writ of Certiorari at 24, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 04-10566), 2005 WL 2974437.

198. *Id.*

199. *Id.* at 25.

200. *Id.*

201. 133 F. App’x 114 (5th Cir. 2005).

202. *Id.* at 120.

203. *See Kadish, supra* note 61, at 41.

other evidence in determining the voluntariness of Defendant's statements.<sup>204</sup>

Although both the *Sanchez-Llamas* majority and concurring opinions agree that suppression law does not directly apply to Article 36 violations, the decision clearly permits trial courts to consider an Article 36 infraction in instructing a jury on voluntariness. These same considerations are relevant in voluntariness challenges arising in other contexts. The United States Code provides procedural safeguards that often result in challenges to confessions or seizures of evidence based on lack of voluntariness. For example, the Federal Rules of Criminal Procedure provide that a defendant may withdraw a guilty plea upon demonstrating a "fair and just reason" for the withdrawal, which includes a showing that the plea was not entered knowingly and voluntarily.<sup>205</sup> The Tenth Circuit addressed this argument in *United States v. Cazares*, in which the defendant argued that an Article 36 violation rendered his guilty plea unknowing and involuntary.<sup>206</sup> He claimed that [as] "a foreign national, he lack[ed] an understanding of the criminal justice system in the United States. . . . [and] his lack of understanding would [have been] remedied by the assistance of the Mexican consulate."<sup>207</sup> Although the Tenth Circuit rejected the claim for lack of specificity, the claim remains available for future defendants seeking to withdraw guilty pleas.

Although foreign nationals may have opportunities to raise Article 36 violations in voluntariness challenges, significant practical barriers exist to obtaining relief in such challenges. First, proof must be offered that the defendant would have exercised the right to have her consulate notified of the arrest. At least one study conducted in Georgia suggests that less than fifteen percent of foreign nationals from VCCR countries<sup>208</sup> who are jailed prior to trial ask to have their consulate notified.<sup>209</sup> The

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204. Jury Instructions at 8, *State v. Bautista Ramirez*, No. OOCR-3159-4 (DeKalb County Super. Ct. June 16, 2003).

205. See FED. R. CRIM. P. 32(e).

206. 60 F. App'x 223 (10th Cir. 2003).

207. *Id.* at 227.

208. This statistic refers to countries that do not have bilateral treaties with the United States that require the consulate be notified of all arrests of their nationals regardless of the individual's wishes. Fifty-six countries are classed by the State Department as "mandatory notification" countries. U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS, INSTRUCTIONS FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM 5 (2002 ed.) [hereinafter DoS BLUE BOOK].

209.

In 2003, at the request of the Department of State, the State of Georgia conducted a survey of all jail admissions in 37 counties during the period from August 31, 2003, through September 14, 2003. During that period, 6,920 individuals were detained, 552 of whom were identified as foreign nationals (7.9%). Almost three-fourths

Georgia study shows that the vast majority of arrested foreign nationals do not want the authorities in their countries to know that they have been arrested in the United States and, significantly, despite the array of services that the Mexican government makes available to its nationals detained in the United States, the percentage of Mexicans requesting consular notification is no higher than that of other countries.<sup>210</sup> This suggests that some foreign nationals' distrust of their own governments trumps their desire for consular help in navigating the U.S. criminal justice system.

The second obstacle, no less formidable, potentially pits Article 36 against other treaty provisions related to consular immunity. A foreign national will endeavor to show actual prejudice by offering an affidavit from the local consulate showing what the consulate would have done to assist in the defense of the foreign national upon notification of his arrest. Such affidavits are subject to evidentiary objections by the prosecution including, significantly, that the affidavit is not subject to cross-examination. While consular officials may be willing to provide the affidavit, few consulates may be willing to waive their immunity under Articles 43<sup>211</sup> and 44<sup>212</sup> of the VCCR and face cross-examination about the substantive contents of the sworn statement.

Finally, as noted in the *Avena* decision, defendants must overcome the fact that authorities do not have to advise a foreign national of his or her rights under Article 36 prior to beginning interrogation,<sup>213</sup> nor does the consulate have to be informed immediately of the accused's arrest, even if he or she requests that the consulate be notified.<sup>214</sup> Defendants

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(72%) of the foreign nationals were eligible for consular notification under Article 36 of the VCCR (the remainder were from mandatory notification countries). Only 77 (13%) requested that their consulate be notified of their arrest and detention after being advised on their rights under Article 36 of the VCCR.

Brief for the Nat'l District Attorneys' Ass'n as Amicus Curiae in Support of Respondent at 10 n.19, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 497761.

210. *Id.* at 10 n.20.

211. "Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions." VCCR, *supra* note 1, art. 43.

212. "Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State." VCCR, *supra* note 1, art. 44. *See also Flynn v. Shultz*, 748 F.2d 1186, 1188 (7th Cir. 1984).

213. Case Concerning *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, ¶ 63 (Mar. 31).

214. *Id.* ¶ 97 (finding that a delay of three business days in sending notice to the consulate met the requirements of Article 36(1)(b)).

may therefore have divulged damaging information before consular assistance becomes available.

Due to these practical problems, many foreign nationals will be unable to obtain relief from Article 36 violations through voluntariness challenges. However, relief may still be available to foreign nationals through other “constitutional and statutory protections [that] . . . safeguard the . . . interests . . . advanced by Article 36.”<sup>215</sup> For example, before a court can decide whether a “confession itself [is] voluntary,”<sup>216</sup> it must find “that a defendant has made a knowing and voluntary waiver of his or her *Miranda* rights.”<sup>217</sup> Any underlying harm caused by language or cultural barriers can be raised by a foreign national to allege that her *Miranda* waiver was not knowing and intelligent.

A *Miranda* waiver is not knowing and intelligent if the waiving party lacks a full understanding of the relevant circumstances and likely consequences of his waiver.<sup>218</sup> If a foreign national’s waiver of her right against self-incrimination is not knowing and intelligent, her statements must be suppressed, regardless of whether an Article 36 violation occurred. As Justice Ginsburg explained in her *Sanchez-Llamas* concurrence, a detained foreign national who, due to language or cultural barriers, did not fully comprehend her *Miranda* rights “would have little need to invoke the Vienna Convention, for *Miranda* warnings a defendant is unable to comprehend give the police no green light for interrogation.”<sup>219</sup> Under the longstanding *Johnson v. Zerbst* standard for waiver, courts must consider “the particular facts and circumstances surrounding th[e] case, including the background, experience, and conduct of the accused.”<sup>220</sup> This analysis could include a foreign national’s poor English language skills, experiences in her country of origin,<sup>221</sup> or other language or cultural barriers that detract from the defendant’s understanding of her rights in the U.S. legal system.<sup>222</sup> These challenges offer an alternative basis for relief for foreign nationals who do not understand their fundamental rights. For example, in *United States v. Garibay*, the Ninth Circuit held that a foreign national’s *Miranda* waiver was not

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215. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681 (2006).

216. *Smith v. Duckworth*, 856 F.2d 909, 911 (1988).

217. *Id.*

218. *United States v. Burns*, 433 F.3d 442 (5th Cir. 2005).

219. *Sanchez-Llamas*, 126 S. Ct. at 2688.

220. 304 U.S. 458, 464 (1938). *See also* *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1102 (9th Cir. 2005) (“Courts indulge every reasonable presumption against waiver of fundamental constitutional rights.”).

221. *Johnson v. Zerbst*, 304 U.S. at 464.

222. *See, e.g.*, Brief of Amici Curiae Bar Associations, Human Rights Organizations and Other Legal Groups in Support of Petitioners at 15–16, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 04-10566, 05-51), 2005 WL 3543084.

knowing and intelligent, where the defendant had little understanding of English and did not receive *Miranda* warnings in his native language.<sup>223</sup> Further, he did not sign a written waiver of his rights, was not provided with an interpreter, and had no previous experience with the U.S. criminal justice system.<sup>224</sup>

The main problem foreign nationals face in attempting to challenge *Miranda* waivers is that reviewing courts do not adequately consider the impact of cultural barriers. Justice Breyer took special note of this problem in his *Sanchez-Llamas* dissent, describing the following two hypothetical defendants whose grievances would not be adequately addressed in a traditional challenge to the waiver of *Miranda* rights: 1) "a person who fully understands his *Miranda* rights but does not fully understand the implications of these rights for our legal system,"<sup>225</sup> and 2) "a foreign national. . . who comes from a country where confessions made to the police cannot be used in court as evidence, who does not understand that a state-provided lawyer can provide him crucial assistance in an interrogation, and whose native community has great fear of police abuse."<sup>226</sup>

Previous precedent validated Justice Breyer's concerns that such cultural barriers would not be adequately addressed in most court challenges. For example, in *United States v. Heredia-Fernandez*, the court of appeals found a knowing and intelligent waiver where the Mexican defendant

read the [Spanish-language] form describing his *Miranda* rights and claimed to understand these rights, subsequently signing the waiver when asked if he was willing to do so. He later said he remembered and still understood his rights, and indicated that he did not wish to have them read to him.<sup>227</sup>

This decision might have been different if the Ninth Circuit's analysis had considered that "under Mexican criminal law, statements given to the police during an interrogation are deemed to have no evidentiary value . . . [and] cannot serve as the sole basis for . . . prosecution."<sup>228</sup> In *United States v. Rodriguez-Preciado*,

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223. 143 F.3d 534, 538–39 (9th Cir. 1998).

224. *Id.*

225. 126 S. Ct. at 2706 (noting such a defendant may not be able to show that his confession was involuntary).

226. *Id.*

227. 756 F.2d 1412, 1416 (9th Cir. 1985).

228. Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner Moises Sanchez-Llamas at 10, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 04-10566), WL 3543087.

[Police officers] knocked on the door and [Silva, a Mexican national] answered. . . . [Officer] Hascall spoke some Spanish and stated in Spanish that he was a police officer and asked for permission to enter the room. Silva said "Si," backed away from the door, and motioned with his arms for the officers to enter the room. . . . Hascall then asked Silva for permission to search the room for drugs. Silva consented.<sup>229</sup>

The Ninth Circuit found that consent to search was given voluntarily on the basis that "the officers did not draw their guns or threaten to obtain a search warrant if consent was refused . . . [and] after [police] asked Silva in Spanish whether the officers could enter the room, Silva said 'si' and motioned for the officers to enter."<sup>230</sup> In this context, cultural barriers—including Silva's experience with police in his home country—are highly relevant to his ability to consent to the search. The *Sanchez-Llamas* dissent recognized the importance of such barriers.

Cultural barriers can be addressed if defense attorneys make a concerted effort to increase awareness of them when raising challenges to voluntariness, or to waivers of rights by foreign nationals. The voluntariness question has already been adapted to reflect similar concerns that arise with juvenile confessions. The Supreme Court, in *Application of Gault*, recognized that juveniles who are read their constitutional rights do not necessarily appreciate those rights, and "special problems may arise with respect to waiver . . ."<sup>231</sup> Regarding juvenile confessions, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."<sup>232</sup> *Gault* demonstrates that the law's current inadequacy with regard to cultural barriers can be corrected. A strong analogy can be drawn between *Gault* and *Sanchez-Llamas*. Defense attorneys representing foreign nationals should emphasize that, like juveniles, "[d]etained foreign nationals are similarly susceptible to fear and manipulation, both of which are compounded by the language barriers they often face."<sup>233</sup>

Existing law provides additional mechanisms that could be adapted to address the harm caused by cultural barriers. For example, when a waiver occurs during court proceedings, trial courts could question defendants about cultural factors to ensure that they understand the implications of waiver. The Ninth Circuit requires that:

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229. 399 F.3d 1118, 1123 (9th Cir. 2005).

230. *Id.* at 1126.

231. 387 U.S. 1, 55 (1967).

232. *Id.*

233. Brief of the NACDL, *supra* note 9, at 8.



The right to a jury trial . . . [must] be waived . . . voluntarily, knowingly, and intelligently . . . [and] to comply with this . . . requirement, a district court should inform the defendant that 1) twelve members of the community compose a jury, 2) the defendant may take part in jury selection, 3) a jury verdict must be unanimous, and 4) the court alone decides guilt or innocence if the defendant waives a jury trial. Furthermore, the district court should question the defendant to ascertain whether the defendant understands the benefits and burdens of a jury trial and freely chooses to waive a jury.<sup>234</sup>

A similar procedure could be used to address cultural barriers. Prior to accepting a waiver by a foreign national, a trial court could, for example, ask the foreign national to explain his understanding of the role of his defense lawyer.

*Sanchez-Llamas* may permit consideration of these same factors in conjunction with the waiver of any fundamental right. A foreign national's waiver of the right to counsel, the right to a jury trial, the right to be present at trial, or any other constitutional right must be knowing and intelligent, as well as any consent to search, or decision to plead guilty to a criminal charge. A waiver of a fundamental right that is not knowing and intelligent violates due process and can be remedied through suppression, dismissal of an indictment, or the overturning of a final conviction. Many statutes also impose requirements for knowing and intelligent waiver or consent. For example, the Federal Code of Criminal Procedure requires that a defendant must knowingly and intelligently consent to trial before a magistrate judge,<sup>235</sup> trial delays,<sup>236</sup> or trial before a jury with fewer than twelve members.<sup>237</sup> A defendant must knowingly and intelligently waive the right to request DNA testing of evidence,<sup>238</sup> a preliminary hearing,<sup>239</sup> an indictment,<sup>240</sup> or the right to be present at court proceedings.<sup>241</sup>

The protections listed above are all examples of "constitutional and statutory protections [that] . . . safeguard the . . . interests . . . advanced by Article 36."<sup>242</sup> A foreign national can raise any harm caused by language or cultural barriers in conjunction with these protections.

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234. *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1102–03 (9th Cir. 2005).

235. *FED. R. CRIM. P.* 5.1(a)(5).

236. *Id.* r. 5.1(d).

237. *Id.* r. 23(b)(2).

238. 18 U.S.C. § 3600(a)(3)(A)(i) (2004).

239. *FED. R. CRIM. P.* 5.1(a)(1).

240. *Id.* r. 7(b).

241. *Id.* r. 43(c).

242. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681 (2006).

Although the impact of language and cultural barriers is the primary basis for relief in these challenges, an Article 36 violation could be raised to demonstrate that the absence of consular assistance decreased the likelihood that the waiver or consent at issue was knowing and intelligent.

After *Sanchez-Llamas*, the violation of Article 36 by authorities may play a role in some voluntariness challenges. This role will most likely be limited. However, foreign nationals who are unable to obtain relief from Article 36 violations may be able to address the harm caused by language and cultural barriers under domestic law provisions. Raising Article 36 violations may draw attention to the effects of these barriers and provide relief for some defendants. That the *Sanchez-Llamas* dissent recognized the issue of cultural barriers suggests the Court may continue to examine it in later decisions.

## 2. Ineffective Assistance of Counsel

Under the *Sanchez-Llamas* majority's interpretation of the "full effect" language in Article 36(2), an Article 36 violation could be raised in conjunction with any of the "constitutional and statutory protections. . . [that] safeguard the same interests *Sanchez-Llamas* claims are advanced by Article 36."<sup>243</sup> The majority specifically listed due process protections and the right to counsel as examples, but this list is not exclusive. Under the appropriate facts, an Article 36 claim could support any constitutional or statutory challenge where it is relevant that "the failure to inform defendants of their right to consular notification gives them a 'misleadingly incomplete picture of [their] legal options.'"<sup>244</sup>

Ineffective assistance of counsel claims may be the most promising means of addressing Article 36 violations in the future. Any prejudice from an Article 36 violation that occurs after a foreign national obtains counsel can likely support a claim of ineffective assistance of counsel. To succeed on such a claim, a claimant must demonstrate that 1) counsel's performance was deficient, and 2) that the deficient performance actually prejudiced the defendant.<sup>245</sup> Prior to *Sanchez-Llamas*, lower courts had suggested that failure by counsel to raise consular assistance issues could be a basis for an ineffective assistance claim. For example, in *Ledezma v. State*, the Supreme Court of Iowa expressed its belief that "all criminal defense attorneys representing foreign nationals should be

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243. *Id.*

244. *Id.* (quoting Brief for Petitioner Moises Sanchez-Llamas at 10–11, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 04-10566), 2005 WL 3598178.

245. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

apprised of Article 36 . . .”<sup>246</sup> and that they “[have] a duty to investigate the applicable national and foreign laws.”<sup>247</sup>

During oral arguments in *Sanchez-Llamas*, a considerable portion of the time allotted for argument was spent discussing a defense counsel’s role in notifying foreign nationals of Article 36 requirements and benefits. Several Justices made statements to the effect that a defense “lawyer should be taxed with knowing that [a foreign national has a right to consular assistance] . . . because it’s the law of the land . . . . [T]he obligation is on the lawyer to [ask if the defendant received notice of his Article 36 rights] just as the lawyer would [ask if they received] the *Miranda* warnings.”<sup>248</sup> Thus, if counsel fails to inform the foreign national about consular assistance rights, “then that’s ineffective assistance in an appropriate circumstance . . . . And the other obligation is, counsel, you have to raise this issue as soon as everybody learns about it . . . .”<sup>249</sup>

These statements demonstrate that a defense attorney representing a foreign national has two obligations with regard to Article 36. First, counsel is charged with a duty to notify a foreign national of her consular assistance rights. Second, counsel must raise any Article 36 violation at the proper time. Failure to do either of these should satisfy the deficient performance prong of the *Strickland* ineffectiveness test. A foreign national who suffers prejudice as a result of this failure has a reasonable chance of succeeding on an ineffective assistance of counsel claim under *Strickland*.

During oral arguments, several Justices suggested that the facts underlying *Bustillo v. Johnson* demonstrated ineffective assistance of counsel. In *Bustillo*, the defendant presented a theory, supported by the testimony of two witnesses, that a man named “Sirena” committed the crime.<sup>250</sup> Bustillo did not learn of his right to contact the Honduran consulate until after conviction, at which time the consulate located additional evidence supporting this theory, including a critical taped confession by Sirena.<sup>251</sup> Counsel’s failure to address clear Article 36 issues led to both the procedural default of Bustillo’s Article 36 claim and the inability to present crucial evidence at trial. Ultimately, the majority concluded that Bustillo’s counsel made a strategic decision not to pursue his Article 36 claim and therefore was not ineffective under *Strickland*.<sup>252</sup>

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246. 626 N.W.3d 134, 150 (Iowa 2001).

247. *Id.* at 152.

248. Transcript of Oral Argument at 36–37, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No 04-10566), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-10566.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-10566.pdf).

249. *Id.* at 31.

250. *Sanchez-Llamas*, 126 S. Ct. at 2676.

251. *Id.* at 2676–77.

252. See Transcript of Oral Argument, *supra* note 248, at 58–59.

Despite failing in Bustillo's case, ineffective assistance of counsel claims can provide a basis for obtaining relief from Article 36 violations that is superior to voluntariness challenges. To establish ineffectiveness, a foreign national need only demonstrate prejudice, since the Article 36 violation itself should be sufficient to satisfy the deficient performance requirement, unless the decision not to contact the consulate is a strategic one made by his counsel.<sup>253</sup> In *Bustillo*, defense counsel was the son of Salvadoran diplomats and was familiar with Article 36 issues, but he decided it would be better to limit the number of people to whom his client spoke.<sup>254</sup> The *Bustillo* ineffectiveness issue was unique to its facts. Ineffective assistance of counsel claims are likely the most promising means of obtaining relief for Article 36 violations.<sup>255</sup>

### 3. Other Constitutional Remedies

Article 36 violations may serve as the ground for other constitutional challenges. Many Article 36 claims involve difficulties foreign nationals face in locating witnesses, evidence, and qualified counsel. Where inability to obtain evidence results in a fundamental miscarriage of justice, an Article 36 violation may sustain a due process challenge. This could occur if the lack of consular access prevented the foreign national from obtaining evidence crucial to her defense. In *Valdez v. State*, the Oklahoma Court of Appeals overturned a death sentence, where, as a result of an Article 36 violation, "the jury was not presented with very significant and important evidence bearing upon Petitioner's mental status and psyche at the time of the crime."<sup>256</sup>

Depending on the facts at issue, an Article 36 claim could be incorporated into any number of statutory or constitutional challenges. For example, an Article 36 violation could be raised to demonstrate "good cause" for the failure to meet the statutory deadline for notification of the intent to present an alibi witness.<sup>257</sup> Under certain facts, an Article 36 claim could also be raised to establish a speedy trial violation in contravention of the Sixth Amendment. The four-pronged test for failure to provide a speedy trial includes, in part, consideration of the reason for the delay and whether the defendant asserted her right to a speedy trial.<sup>258</sup>

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253. Under *Strickland*, counsel's strategic decisions made after a thorough investigation of relevant law and facts cannot support a claim of ineffective assistance of counsel. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

254. See Transcript of Oral Argument, *supra* note 248, at 58–59.

255. *Id.* at 29, 31.

256. 46 P.3d 703, 710 (Okla. Crim. App. 2002).

257. See FED. R. CRIM. P. 12.1.

258. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

The Second Circuit in *United States v. Carini*, in finding a speedy trial violation, considered that

the defendant, . . . though certainly not by an evil intent on the part of the prosecutors, was misled and lulled into not pressing for trial during this 16-month period because of his justifiable belief that the prosecution had the authority to offer him the attractive plea bargain it was then proposing.<sup>259</sup>

By analogy, if a foreign national can establish that lack of consular assistance in violation of Article 36 similarly prevented him from asserting his right to a speedy trial, this could excuse his failure to assert the right and also support an argument that the delay should be attributed to the government.

The *Sanchez-Llamas* majority demonstrated some sensitivity to the positions of foreign nationals in situations such as this by providing that, when a defendant learns of her Article 36 rights at trial, “a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance.”<sup>260</sup> Although this provision is not, in itself, a specific judicial remedy, a court’s failure to “make appropriate accommodations” could support more specific remediation in future litigation. For example, as noted above, in *United States v. Beckford*, the Fourth Circuit denied relief on an Article 36 claim based on the trial court’s refusal to grant a continuance after the defendant learned of his Article 36 rights at trial.<sup>261</sup> Given the holding in *Sanchez-Llamas*, foreign nationals like the defendant in *Beckford* may be entitled to judicial relief—the denial of a continuance is reversible error if the trial court abuses its discretion, resulting in actual prejudice to the defendant.<sup>262</sup> *Sanchez-Llamas* offers strong support for an argument that refusing to continue proceedings to allow exercise of Article 36 rights constitutes an abuse of discretion. The denial of a continuance also can violate due process if the defendant is prejudiced by “an unreasoning and arbitrary ‘insistence upon expeditiousness in the face of a justifiable request for delay.’”<sup>263</sup> After *Sanchez-Llamas*, requesting a continuance to exercise Article 36 rights is arguably “a justifiable request for delay.”

In any circumstances where a trial court’s failure to “make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance”<sup>264</sup> prejudices a defendant,

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259. 562 F.2d 144, 149 (N.Y. 1977).

260. 126 S. Ct. at 2682 (2006).

261. No. 97-4926, 2000 WL 376155, at \*13 (4th Cir. May 3, 2000).

262. *United States v. Jones*, 455 F.3d 800, 805 (7th Cir. 2006).

263. *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983).

264. *Sanchez-Llamas*, 126 S. Ct. at 2682.

the defendant undoubtedly should seek a specific judicial remedy. The specific remedy sought should vary based on the underlying facts. *Sanchez-Llamas* suggests that no objective standard exists for granting relief on Article 36 claims. Pather, the availability of relief will depend on subjective factors that vary for individual defendants. Questions of voluntariness and waiver will turn on a foreign national's proficiency in English and his prior experience with American or other criminal justice systems. This was evident in *United States v. Salas*, in which the Fourth Circuit found that consent to search was voluntary, where "[a]t the time of the encounter, Salas had been living in the United States for four years and appeared to the officers to speak and understand English with little difficulty."<sup>265</sup> It may therefore be more likely that those defendants who have recently arrived in the United States or who are most unfamiliar with its culture will obtain relief on this basis.

In other constitutional challenges, relief will depend on the degree of prejudice suffered by the defendant. A final conviction will not be overturned unless a constitutional violation prejudices the defendant at trial. A constitutional error is "harmless" if a reviewing court is "able to declare a belief that it was harmless beyond a reasonable doubt."<sup>266</sup> For example, the Eighth Circuit in *United States v. Santos* assumed without deciding that an Article 36 violation rendered a defendant's confession involuntary, but the court denied relief because the error was harmless in light of the overwhelming evidence of guilt.<sup>267</sup> An Article 36 violation would also be harmless if the evidence subject to dispute duplicated other evidence presented at trial.<sup>268</sup> Many federal circuit court decisions have applied a prejudice analysis to Article 36 claims whether or not constitutionally based. As in voluntariness challenges, the personal characteristics of a defendant will be relevant to the degree of prejudice suffered from an Article 36 violation. For example, the Tenth Circuit in *United States v. Minjares-Alvarez* found no prejudice where the defendant "was raised primarily in the United States, . . . understood his constitutional rights, and was generally familiar with this country's criminal processes."<sup>269</sup>

Many courts also require a defendant to show "what the consular official would have advised . . . [and] how the help the consul might have given him would have added to or varied from the assistance that an attorney would have provided, which assistance he knowingly waived."<sup>270</sup>

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265. No. 98-4374, 1998 WL 911731, at \*2 (4th Cir. Dec 31, 1998).

266. *Chapman v. California*, 386 U.S. 18, 24 (1967).

267. 235 F.3d 1105, 1108 (8th Cir. 2000).

268. *See, e.g., State v. Issa*, 752 N.E.2d 904 (Ohio 2001).

269. 264 F.3d 980, 988 (10th Cir. 2001).

270. *United States v. Briscoe*, 69 F. Supp. 2d 738, 747 (D. V.I. 1999).

Countries offer a wide "spectrum of consular intervention," providing varying levels of assistance based on the nature of the underlying offense and the punishment authorized for the offense, "relevant national policies," the type<sup>271</sup> and size of the consulate, the resources available to the consulate,<sup>272</sup> the distance between the consulate and where the accused is incarcerated, and in some cases, the foreign policy of the United States.<sup>273</sup> The Mexican consulate offers a great deal of assistance and will provide interpreters, secure counsel, supply evidence, locate and transport witnesses, attend legal proceedings, and collect and present mitigating evidence at sentencing.<sup>274</sup> In contrast, the British consulate informs its nationals that it will do "all we properly can to contact you within 24 hours of being told that you have been detained . . . [but will not] interfere in . . . court proceedings . . . give . . . legal advice, investigate crimes[,] or carry out searches for missing people."<sup>275</sup> Thus, a Mexican national and a British national who suffered the same violation would not necessarily be entitled to the same Article 36 relief.

When consular assistance is available on a purely discretionary basis, it will be difficult for a foreign national to demonstrate what the consulate would have done if contacted. For example, the Philippine consulate, "as may be appropriate in particular cases and to the extent permitted by its limited resources,"<sup>276</sup> may provide any of the following: a list of lawyers; advice on dealings with authorities; intervention in ju-

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271. The VCCR divides consulates into four classes: consulates-general, consulates, vice consulates and consular agencies. Embassies may also perform consular functions. VCCR, *supra* note 1, arts. 1, 3. Consulates are further classified based on whether they are staffed by career foreign service personnel or by an honorary consul who may be a national of the receiving state. *Id.* arts. 1, 58.

272. ANNE JAMES & MARK WARREN, A UNIVERSAL SAFEGUARD: PROVIDING CONSULAR ASSISTANCE TO NATIONALS IN CUSTODY, AN INTRODUCTORY GUIDE FOR CONSULAR OFFICERS 28 (undated) ("Not all consular officers are endowed with the means to provide the full range of consular assistance. . . ."). Evidence of what consular service would have been provided may be subject to scrutiny or excluded altogether, or consulates may be reluctant to provide such evidence at all. *See supra* text accompanying notes 211 and 212.

273. For example, the United States requires personnel assigned to diplomatic or consular posts from Cuba, the Democratic People's Republic of Korea, and Iran to "request the Department's permission to travel . . . in advance of all proposed travel." *See* U.S. Dep't of State, Office of Foreign Missions, Travel Program, <http://www.state.gov/ofm/travel/>.

274. Application Instituting Proceedings, Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) at III.B.23 (Jan. 9, 2003), available at [http://www.icj-cij.org/icjwww/idoCKET/imus/imusorder/imus\\_application\\_20030109.PDF](http://www.icj-cij.org/icjwww/idoCKET/imus/imusorder/imus_application_20030109.PDF).

275. Foreign & Commonwealth Office, London, What the Consular Department Can and Cannot Do for You (Apr. 19, 2006), <http://www.britainusa.com> (search for document title). *See also* R v. Sec'y of State for Foreign & Commonwealth Affairs *ex parte* Butt, [July 9, 1999] (116) ILR 608 (Court of Appeal) (U.K.).

276. Partnership for Distressed Filipino Nationals in the United States of America at 2.4, (Agreement between the Philippine Foreign Service and a consortium of Filipino-American organizations), <http://www.naffaa.org/2005naffaa/files/030520moupabarpdfa.pdf>.

dicial proceedings if a prima facie miscarriage of justice exists; contact with detained nationals; and information for the relatives of the nationals.<sup>277</sup> However, “the question of whether and how far the protection of a Filipino national’s interests should be exercised is—as a rule—a matter for the Government to decide from case to case.”<sup>278</sup> In light of these considerations, relief for future Article 36 violations will be highly fact-dependent and will not be equally available to all defendants, even those from the same country.<sup>279</sup>

### B. Diplomatic Remedies

Because *Sanchez-Llamas* limits judicial remedies for future Article 36 violations, greater emphasis must be placed on diplomatic methods for obtaining relief. The *Sanchez-Llamas* majority expressly designated diplomatic avenues as “the primary means of enforcing” the VCCR.<sup>280</sup> Both the executive and legislative branches have the power to enforce Article 36 requirements, and both may be susceptible to political pressure from domestic and international sources.

#### 1. Executive Channels

The executive branch has both preventive and remedial powers with regard to Article 36 violations. The federal government’s preventive powers consist primarily of educational efforts aimed at increasing Article 36 compliance and preventing the recurrence of Article 36 violations.<sup>281</sup> Remedial powers include: 1) State Department investigations into specific cases of Article 36 noncompliance; 2) the issuance of

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277. *Id.*

278. *Id.*

279. Within the last several years, foreign nationals have attempted at least two instances to use the courts in their countries to force their governments to provide consular services to detained citizens. In *Khadr v. Canada*, a Canadian citizen being held by the United States at the detention facility at Guantánamo Bay, Cuba, brought a mandamus action against the Minister of Foreign Affairs to compel Canada to provide him with the consular services specified in the “Guide for Canadians Imprisoned Abroad.” *Khadr v. Canada* (Minister of Foreign Affairs), [2005] F.C. 135 (Can.). In *R v. Sec’y of State for Foreign & Commonwealth Affairs ex parte Butt*, [July 9, 1999] (116 ILR 608 (Court of Appeal) (U.K.), nine British nationals who were being prosecuted in Yemen on terrorism charges brought a similar action in England to have the court order the Foreign and Commonwealth Office “to make personal representations to the President of Yemen, that the present trial be halted, that an independent medical commissioner to examine the torture aspect be appointed, and that a retrial be ordered.” While neither of these actions was successful, they may portend future attempts to use litigation as a means of influencing diplomatic personnel to provide consular services. See also *R. v. Sec’y of State for Foreign and Commonwealth Affairs*, [2006] EWHC 972 (Admin) (Libyan national who was a longtime resident of the United Kingdom brought action to compel the U.K. Government to act on his behalf).

280. 126 S. Ct. at 2681 (2006).

281. Brief for the United States, *supra* note 124, at 24.



formal apologies to foreign governments if a violation is confirmed; and 3) State Department requests for Article 36 violations to be considered in clemency proceedings.<sup>282</sup>

#### a. Preventive Power

The executive branch exercises preventive power primarily through state and federal agencies, which conduct educational and training programs to prevent the recurrence of Article 36 violations. Recent efforts by the State Department and other agencies appear increasingly effective in preventing Article 36 violations at the federal, state, and local levels, but this success is a recent development. Early efforts by the State Department to educate law enforcement about the VCCR served only to demonstrate how little the diplomatic and consular community knew about communicating with law enforcement and criminal justice agencies in the United States. Communicating with the over 17,800 local, state, tribal, and federal law enforcement agencies<sup>283</sup> is a daunting task due to the lack of any central authority or common communications system.<sup>284</sup> As one commentator has noted, "[i]ntroducing simple reforms into a complex system is extremely difficult. This has long been true in the realm of criminal justice."<sup>285</sup> Even within a single state, most local law enforcement agencies operate independently of each other and state government,<sup>286</sup> and it is difficult to communicate significant changes in law or policy.<sup>287</sup>

282. *Id.* at 24–25.

283. Brian A. Reaves & Matthew J. Hickman, *Census of State and Local Law Enforcement Agencies, 2000*, in BUREAU OF JUSTICE STATISTICS BULLETIN 1 (Oct. 2002) (17,784 state and local law enforcement agencies surveyed); Brian A. Reaves & Timothy Hart, *Federal Law Enforcement Officers, 2000*, BUREAU OF JUSTICE STATISTICS BULLETIN 1 (July 2001) (sixty-nine federal law enforcement agencies surveyed); Matthew Hickman, *Tribal Law Enforcement, 2000*, BUREAU OF JUSTICE STATISTICS FACT SHEET 1 (Jan. 2003) (171 law enforcement agencies surveyed).

284. Daniel J. Freed, *The Nonsystem of Criminal Justice*, in LAW AND ORDER RECONSIDERED: A STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 263, 266–67 (James S. Campbell, Joseph R. Sahid & David P. Stang eds., 1969).

285. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687 (1992).

286. See Mary Clifford, *The Criminal Justice System in the United States: General Overview*, in COMPARATIVE AND INTERNATIONAL CRIMINAL JUSTICE SYSTEMS: POLICING, JUDICIARY AND CORRECTIONS 11, 17–18 (Obi N. Ignatius Ebbe ed., 1996); V.A. LEONARD & HENRY N. MORE, *THE GENERAL ADMINISTRATION OF CRIMINAL JUSTICE* 103 (1967); David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89, 90 (2006) (“[L]aw enforcement often seems to operate outside of the normal processes of local government, accountable to no one.”). See also *McMillian v. Monroe County*, 520 U.S. 781, 794 (1997).

287. Samuel Walker, *The New Paradigm of Police Accountability: the U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 18 n.84 (2003) (“[F]ederal courts have no ability to ensure that all officers are even informed of important new decisions.”). See also STEPHEN L. WASBY, *SMALL TOWN POLICE AND THE*

Shortly after the United States ratified the VCCR, the State Department advised state governors that “[w]e do not believe that the Vienna Convention will require significant departures from existing practice within the several states of the United States.”<sup>288</sup> Between 1970 and 1997, the Department’s effort to educate law enforcement about Article 36 was limited to a two-page letter mailed occasionally to state attorneys general, governors, and the mayors of large cities.<sup>289</sup> This memorandum “remind[ed] . . . law enforcement personnel that, whenever they arrest or otherwise detain a foreign national in the United States, there may be a legal obligation to notify diplomatic or consular representatives of that person’s government in this country.”<sup>290</sup> Absent from the 1993 memorandum was any indication that the requirement for consular notification stemmed from a treaty which, under the Supremacy Clause, imposed binding obligations on state and local law enforcement.<sup>291</sup> With the exception of training programs held in Los

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SUPREME COURT 4–14 (1976); Albert. T. Goodwin, *How the Supreme Court Employs Inferior Courts as Messengers*, 75 OR. L. REV. 699, 701 (1996); Bradley C. Canon, *Studying Agency Implementation of Judicial Policies: A Heuristic Model* 8 (annual meeting of the Midwest Political Sci. Ass’n, Chicago, Ill., Apr. 7, 2005), available at <http://www.allacademic.com>.

288. U.S. Dep’t of State, Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li* at A-9, <http://www.state.gov/documents/organization/7111.doc> (quoting an April 1970 letter from John R. Stevenson, State Department Legal Adviser, to the governors of the states). It must be noted that that while this Article focuses on Article 36 as it applies within the criminal justice system, consular notification under Articles 36 and 37 of the VCCR also applies to other situations where governments assume custody or control of foreign children and dependent adults (including through guardianship or trusteeship), due to deaths of foreign nationals in plane crashes and shipwrecks. See Pamela Kemp Parker, *When a Foreign Child Comes Into Care: Has the Consul Been Notified?*, 19 A.B.A. CHILD L. PRAC. 177 (2001).

289. William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT’L L. 257, 274–275 (1998); See also Declaration of Ambassador Maura A. Harty Regarding United States Compliance with Article 36(1)(b) of the Vienna Convention on Consular Relations, at 4–6, attachment to Counter-Memorial of the U.S., Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 12 (Mar. 31) [hereinafter Harty Declaration].

290. U.S. Dep’t of State, Notice for Law Enforcement Officials on Detention of Foreign Nationals (April 20, 1993) (on file with author) [hereinafter 1993 Notice]. The text of the 1993 Notice covers two typewritten pages and was similar to memoranda sent in 1986 and 1991. An Annex to the 1993 Notice contained phone numbers for foreign embassies and consulates. See also Aceves, *supra* note 289, at 275; Molora Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 UCLA L. REV. 307, 332 (1999).

291. Also absent from the memo was the text of Article 36 or even a citation to the treaty. As Aceves noted, “the State Department notice itself [was] not binding upon state or local officials.” Aceves, *supra* note 289, at 275. Whether inclusion of a citation to the treaty would have helped emphasize the legal requirements imposed by Article 36 is questionable, since at the time few law enforcement agencies had access to, let alone copies of, *United States Treaties & International Agreements* (U.S.T.), the official compilation of treaties to which the United States is a party. Although U.S.T. is comparable to the United States Code, it was highly unusual to find copies of it outside of major law libraries. Lack of access to

Angeles and Atlanta prior to the 1984 and 1996 Olympics,<sup>292</sup> law enforcement training on the VCCR by the Office of the Legal Adviser at the State Department appears to have focused on law enforcement agencies in and around Washington, D.C., and New York City.

Beginning in 1997, the State Department significantly expanded its efforts to inform state and local law enforcement about Article 36.<sup>293</sup> The Office of the Legal Adviser, in response to Paraguay's application in the ICJ<sup>294</sup> and increasing pressure from foreign governments,<sup>295</sup> undertook a detailed examination of State Department practices and initiated a new outreach program.<sup>296</sup> In 2001, based on the recommendations from the Legal Adviser, the Secretary of State agreed to expand the outreach program on the VCCR. Responsibility for VCCR training was located in the Bureau of Consular Affairs, and a career consular officer was assigned to head an Office of Consular Notification (OCN) within the Bureau.<sup>297</sup> Since 2001, the OCN has conducted over 400 training sessions.<sup>298</sup> In addition, it has distributed over 145,000 copies of its publication, *Consular Notification and Access*,<sup>299</sup> as well as

adequate legal materials by law enforcement has been a persistent problem that has been documented since the 1970s. WASBY, *supra* note 287, at 35; Goodwin, *supra* note 287, at 701.

292. The primary emphasis of the training, which was held on November 14–15, 1995, in Atlanta, was on diplomatic and consular immunity (*see* VCCR *supra* note 1, arts. 31–35, 40–45, 59, 61, 63) rather than on arrests of foreign nationals. However, one hour of the program was devoted to Article 36 procedures. *See* Memorandum from Bob Keller, Prosecution Planning Group for the 1996 Olympics, to All Metro Atlanta Prosecuting Attorneys, Diplomatic & Consular Immunity Training (Nov. 8, 1995) (on file with authors); Memorandum from Molly Johnson Halle, FBI Atlanta, to Criminal Justice Task Force, Diplomatic Immunity Training (Nov. 2, 1995) (on file with authors).

293. Sam Howe Verhovek, *U.S. Renews Campaign to Safeguard Rights of Foreign Citizens*, N.Y. TIMES, Nov. 30, 1997, § 1, at 27. *See also* Harty Declaration, *supra* note 289, at 7.

294. *See* Application of the Republic of Paraguay, Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.) 2000 I.C.J. Pleadings 3 (April 3, 1998).

295. Harty Declaration, *supra* note 289, at 5–6.

296. E-mail messages from M. Elizabeth Swope, Senior Adviser, Bureau of Consular Affairs, Dep't of State (July 26, 2006) (on file with authors).

297. M. Elizabeth Swope was designated as Senior Coordinator for Consular Notification within the Office of the Legal Adviser in 1998 and remained in that position until 2001. Secretary of State Albright transferred the functions to the Office of Public Affairs and Policy Coordination in the Bureau of Consular Affairs "where it acquired a real staff." *Id.*

298. E-mail message from James A. Lawrence, Public Affairs Specialist, Bureau of Consular Affairs at the U.S. Dep't of State (Aug 10, 2006) (on file with authors). Career State Department officers believe that the actual number of training programs on the VCCR that have been conducted by the Department of State since 2001 exceeds this figure by at least threefold. While the Bureau of Consular Affairs assumed primary responsibility for VCCR training, personnel from the Office of Legal Adviser, the Office of the Chief of Protocol, and the Diplomatic Security Service also conducted training programs that included the notification and access aspects of the VCCR.

299. *See* DoS BLUE BOOK, *supra* note 208.

pocket cards,<sup>300</sup> video tapes<sup>301</sup> and compact discs.<sup>302</sup> Courts and commentators have commended the Department's Article 36 efforts since 1998.<sup>303</sup>

State and local governments and law enforcement agencies have also begun adopting meaningful policies and procedures that implement Article 36 requirements. These state actions may have been motivated as much by litigation over Article 36 as by the State Department's increased outreach efforts. Georgia, building on the work done for the 1996 Olympics, published model procedures for the arrest of foreign nationals that implemented Article 36 requirements<sup>304</sup> and incorporated consular notification into the state curriculum for new law enforcement officers and jail booking procedures.<sup>305</sup> Other law enforcement agencies adopted internal procedures implementing Article 36<sup>306</sup> or added consular notification to existing training requirements for officers.<sup>307</sup> In Texas, magistrates were charged with ensuring that arrested foreign nationals were informed of their rights under Article 36 at arraignment.<sup>308</sup> In 1992, the American Correctional Association adopted a standard that requires accredited jails and prisons to have a written policy and practice to provide foreign nationals access to the diplomatic representative of their country of

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300. See U.S. Dep't of State, Consular Notification and Access Reference Card: Instructions for Arrests and Detentions of Foreign Nationals (2004).

301. Video Tape: It's the Right Thing to Do (U.S. Dep't of State 1998).

302. CD-ROM: Consular Notification and Access (U.S. Dep't of State 2006).

303. See, e.g., *United States v. Nai Fook Li*, 206 F.3d 56, 74 (1st Cir. 2000); Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 444 (2004).

304. GA. DEP'T OF COMMUNITY AFFAIRS, A MODEL LAW ENFORCEMENT OPERATIONS MANUAL Ch. 8-1 (6th ed., 1996), available at <http://www.dca.state.ga.us/development/research/programs/downloads/law/Chap8-1.html>. This was also cited by Mexico in Memorial of Mexico, Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) at n.209, available at [http://www.icj-cij.org/icjwww/idocket/imus/imuspleadings/imus\\_ipleadings\\_20030620\\_memorial\\_04.pdf](http://www.icj-cij.org/icjwww/idocket/imus/imuspleadings/imus_ipleadings_20030620_memorial_04.pdf).

305. Effective July 1, 2007, Georgia law requires that "[w]hen any person charged with a felony or with driving under the influence . . . is confined, for any period, . . . a reasonable effort shall be made to determine the nationality of the person so confined." GA. CODE ANN. § 42-4-14(a) (2006).

306. See, e.g., N.Y. POLICE DEP'T, N.Y.P.D. PATROL MANUAL, Procedure No. 208-56 (effective Feb. 28, 2001) cited in Memorial of Mexico, *supra* note 304, n.209.

307. For example, Connecticut, Colorado, Georgia, Kentucky, North Carolina, and Oklahoma now include consular notification and access in the basic training curriculum for all police officers. In Pennsylvania, it has been added to the annual in-service training requirements for municipal police officers. James A. Lawrence, Office of Consular Notification, Update to Appendix 3, State Compliance Initiatives (Aug. 10, 2006) (originally submitted as an appendix to the Harty Declaration, *supra* note 289).

308. John Cornyn, Attorney General of Texas, MAGISTRATE'S GUIDE TO THE VIENNA CONVENTION ON CONSULAR NOTIFICATIONS, Tab I (2000); Harty Declaration *supra* note 289, app. 3 at 5.

citizenship.<sup>309</sup> Of even greater impact on law enforcement practices is the adoption of a consular notification and access standard by the Commission on Accreditation for Law Enforcement Agencies (CALEA) on November 18, 2005.<sup>310</sup>

Federal agencies also have adopted internal procedures that require consular notification.<sup>311</sup> For example, both the Department of Justice and the Department of Homeland Security have issued regulations that implement the requirements of Article 36. However, those regulations differ considerably. The Justice Department regulations<sup>312</sup> split the responsibilities for consular notification between the arresting officer<sup>313</sup> and the United States Attorneys.<sup>314</sup> In contrast, the Department of Homeland Security regulations only apply to immigration cases<sup>315</sup> and place complete responsibility for notification on the arresting officer.<sup>316</sup> Federal agencies have also published articles<sup>317</sup> and provided training on consular notification.

Although preventive efforts by executive agencies may not lead to perfect Article 36 compliance, these efforts have contributed to an overall reduction in the number of Article 36 violations. In recent years, the number of complaints from consular officials that relate to Article 36 has decreased dramatically in many jurisdictions.<sup>318</sup> A small number of consulates have even expressed concern that they are receiving more detention notifications than they can handle.<sup>319</sup> These substantial improvements over a short period of time suggest preventive efforts are, to some degree, an effective means of enforcing Article 36.

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309. See AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS FOR ADULT LOCAL DETENTION FACILITIES (3d ed. 1991). See also, U.S. Dep't St., Consular Notification and Access Standard Operating Procedure (2006), [http://travel.state.gov.model\\_operating\\_procedure.doc](http://travel.state.gov.model_operating_procedure.doc) (citing to the ACA standard).

310. Standard 1.1.4 requires accredited law enforcement agencies to have "[a] written directive [that] governs procedures for assuring compliance with all consular notification and access requirements in accordance with international treaties when dealing with foreign nationals." COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES (5th ed. 2006). All CALEA accredited law enforcement agencies must be in compliance with the new standard by October 1, 2007.

311. See e.g., INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL § 9.4.12.9, available at <http://www.irs.ustreas.gov/irm/part9/ch04s15.html>.

312. 28 C.F.R. § 50.5 (2006).

313. *Id.* at (a)(1) ("[T]he arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given.").

314. *Id.* at (a)(3) ("The U.S. Attorney shall then notify the appropriate consul . . .").

315. See 8 C.F.R. § 236.1(e) (2006).

316. *Id.*

317. See, e.g., M. Wesley Clark, *Providing Consular Rights Warnings to Foreign Nationals*, 71 FBI L. ENFORCEMENT BULL. 22 (Mar. 2002).

318. Harty Declaration, *supra* note 289, at 13.

319. *Id.* at 14.

## b. Remedial Power

The extent of executive power to remedy past Article 36 violations has not been statistically verified. In *Avena*, the United States argued to the ICJ that executive enforcement is sufficient to give “full effect” to Article 36 requirements. The ICJ rejected this claim and ordered judicial “review and reconsideration” of the convictions of fifty-one Mexican nationals by the United States. On February 28, 2005, President Bush, in an ironic gesture, announced that the United States would enforce *Avena* through “unilateral Executive Branch action.”<sup>320</sup> The President issued a memorandum stating that “the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity.”<sup>321</sup> Further, state “procedural default rules may not prevent review and reconsideration for the [fifty-one] individuals identified in *Avena*.”<sup>322</sup>

The memorandum was issued only two months after the Supreme Court granted certiorari in *Medellin v. Dretke* to determine whether the *Avena* judgment required state courts to review the convictions at issue. Pursuant to the memorandum, Medellin filed an application for a writ of habeas corpus in the Texas Court of Criminal Appeals only four days before oral arguments in *Medellin* were to be heard by the Supreme Court.<sup>323</sup> The Supreme Court determined that this state habeas proceeding might provide Medellin with the review and reconsideration of his Article 36 claim that he concurrently sought in the Supreme Court proceeding.<sup>324</sup> In light of the pending state court proceeding, and considering the “number of hurdles Medellin must surmount before qualifying for federal habeas relief in this proceeding,”<sup>325</sup> the Supreme Court dismissed Medellin’s writ of certiorari as improvidently granted.<sup>326</sup> The Supreme Court remained “rightfully agnostic”<sup>327</sup> as to the constitutionality of the February 28 Memorandum, noting that “‘in all likelihood’ [the] Court would be positioned ‘to review the Texas courts’ treatment of the President’s [M]emorandum and [the *Avena* judgment].’”<sup>328</sup>

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320. Brief for the United States as Amicus Curiae Supporting Respondent at 41, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 504490.

321. Memorandum for the Attorney General (Feb. 28, 2005) *reprinted in id.* App. 2.

322. Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 320, at 48.

323. *Medellin*, 544 U.S. at 663–64.

324. *Id.* at 664.

325. *Id.* at 662.

326. *Id.*

327. *Id.* at 673 (O’Connor, J., dissenting).

328. *Id.* at 668 (Ginsburg, J., concurring) (quoting *id.* at 664 n.1 (majority opinion)).

The Texas Court of Criminal Appeals will rule on the constitutionality of the President's memorandum in *Ex parte Medellín*. The position of the United States is that the memorandum was authorized by the President's "constitutionally based foreign affairs power, and his authority under the United Nations Charter."<sup>329</sup> The "presidential determination, like an executive agreement, has independent legal force and effect, and contrary state rules must give way under the Supremacy Clause."<sup>330</sup> The State of Texas contends that the memorandum does not provide a legal basis for review of the procedurally defaulted claim,<sup>331</sup> and that "the President's 'independent authority to act' in foreign affairs [does not include] a unilateral power to preempt state law, based on a unilateral assertion that the preemption serves the United States' foreign policy interests."<sup>332</sup>

The ruling in this case and the appeals that follow will establish the extent of the executive's authority to order judicial review of Article 36 claims. However, the President's memorandum only applies to the cases of the fifty-one Mexican nationals covered in *Avena*, and the United States' withdrawal from the Optional Protocol precludes similar ICJ rulings in the future. Thus, if the executive has the authority to order judicial review of Article 36 claims, it is unclear to what extent this authority would be exercised.

Another option is to use executive clemency to grant pardons, commutations, or reprieves from criminal convictions of foreign nationals who have persuasive Article 36 claims.<sup>333</sup> "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."<sup>334</sup> Clemency is subject to minimal judicial oversight, and may be used "to correct an unjust result in legal proceedings."<sup>335</sup> However, clemency is routinely denied in most capital cases and offers no guarantee of relief for even the most egregious Article 36 violations. In *Avena*, the ICJ concluded that clemency proceedings were not an adequate means of redressing Article 36 violations. Noting the discretionary nature of clemency proceedings, the ICJ found that executive clemency

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329. Brief for the United States, *supra* note 320, at 9.

330. *Id.*

331. Brief of Respondent at 39–40, *Ex parte Medellín*, No. WR-50, 191–02 (Tex. Crim. App. 2006).

332. *Id.* at 39 (quoting *American Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414 (2003)).

333. See Linda E. Carter, *Lessons From Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT'L L. 259 (2005).

334. *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993).

335. Carter, *supra* note 333.

did not guarantee relief for even the most prejudicial Article 36 violations and was not sufficiently reliable as a review of Article 36 claims.<sup>336</sup>

The record on clemency petitions incorporating Article 36 claims bears out the ICJ's concerns. So far, only one foreign national has been granted clemency based on an Article 36 violation. Oklahoma Governor Brad Henry commuted the death sentence of Osbaldo Torres to life in prison without the possibility of parole, based in part on an Article 36 violation raised in his clemency petition.<sup>337</sup> Although clemency remains an option for foreign nationals who have exhausted other legal opportunities, it will rarely be a basis for relief from Article 36 violations, and it may only be available to remedy cases of grave injustice.

## 2. Legislative Channels

Under the *Sanchez-Llamas* majority's interpretation of Article 36(2), any remedy for Article 36 violations must conform to "the laws and regulations of the receiving State."<sup>338</sup> This gives federal and state law-making bodies the ultimate power to decide whether and how to enforce Article 36 requirements. It is likely that different legislative bodies will exercise this power in different ways.

In *Sanchez-Llamas*, the Supreme Court held that "a State may apply its regular rules of procedural default to Article 36 claims."<sup>339</sup> While it is possible that a state could enact legislation that would exempt Article 36 claims from the State's procedural default rules, or, in the alternative, create other judicial remedies for Article 36 violations, no state has taken such a step.

States generally have been hostile toward Article 36 enforcement. A spokesman for Texas Governor Rick Perry has stated that "there is no authority for the federal government [or the ICJ] to prohibit Texas from exercising the laws passed by our legislature."<sup>340</sup> Former Virginia Governor James Gilmore argued that staying an execution based on a violation of Article 36 "would have the practical effect of transferring responsibility from the courts of the commonwealth and the United States to the International Court."<sup>341</sup>

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336. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, ¶ 143 (Mar. 31).

337. Torres v. State, 120 P.3d 1184 (Okla. Crim. App. 2005).

338. 126 S. Ct. at 2680 (2006).

339. *Id.* at 2674.

340. C. Bryson Hull, *Texas Snubs World Court on Execution Stays*, REUTERS, Feb. 11, 2003, <http://www.rense.com/general143/exec.htm>.

341. *Paraguayan National Executed After Appeals Fail*, CNN, Apr. 15, 1998, <http://www.cnn.com/WORLD/americas/9804/15/paraguay.execution.on/>.



Legislatures in Florida<sup>342</sup> and Oregon<sup>343</sup> have enacted statutes reflecting these sentiments. Oregon's statute provides that noncompliance with Article 36 notification requirements is not a basis for civil or criminal liability, and that violation of Article 36 "does not in itself constitute grounds for the exclusion of evidence that would otherwise be admissible in a proceeding."<sup>344</sup> Florida's statute goes even further, stating that the "failure to provide consular notification under the Vienna Convention on Consular Relations or other bilateral consular conventions shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national's discharge from custody."<sup>345</sup>

Some members of Congress have also adopted a hostile attitude towards Article 36 enforcement. Texas Senator John Cornyn has expressly disapproved of any suggestion that "our criminal laws and criminal policies are informed . . . by the rulings of foreign courts."<sup>346</sup> Cornyn also authored an Amicus Brief in *Medellin v. Dretke*, arguing that

petitioner's argument, notwithstanding its impressive amicus support, 'strain[s] the Constitution and the law to a construction never imagined or dreamed of' by those who framed and ratified it. The Framers carefully confined the immense power of judicial review to Article III judges whose appointment requires the dual action of the President and the Senate . . . .<sup>347</sup>

Senator Cornyn's arguments focus on the usurpation of Congress' authority by international tribunals. The Supreme Court's rebuke of the ICJ in *Sanchez-Llamas* may temper some legislative negativity towards Article 36. Indeed, with the domestic-international conflict over the issue subsiding, legislatures may be more willing to pass legislation aimed at enforcing Article 36 requirements. Currently, California,<sup>348</sup> North Carolina,<sup>349</sup> and Oregon<sup>350</sup> have enacted statutes codifying consular notification requirements. Still, these statutes provide inconsistent levels of protection, and none has gone so far as to impose a judicial remedy for Article 36 violations.

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342. FLA. STAT. § 901.26 (2006).

343. OR. REV. STAT. §§ 181.642, 426.234(1)(e), 426.228 (9)(a) (2006).

344. *Id.* §§ 426.28 (9)(b), 426.234(1)(e).

345. FLA. STAT. § 901.26 (2006).

346. S. Res 92, 109th Cong. (2005) (statement of Sen. John Cornyn upon submission of the resolution).

347. Brief for Amicus Curiae Sen. John Cornyn in Support of Respondent at 4, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

348. CAL. PENAL CODE §§ 834c(a)(1), 5028(b) (West Supp. 2005).

349. N.C. GEN. STAT. § 122C-344 (2003).

350. OR. REV. STAT. §§ 181.642, 426.234(1)(e), 426.228 (9)(a) (2006).

California's statute currently offers the highest level of protection and essentially codifies Article 36 requirements. The statute provides that any peace officer detaining a foreign national for more than two hours must give notice of consular assistance rights and follow State Department procedures for compliance with notification requests. Training manuals for California law enforcement agents must "incorporate language based upon provisions of [Article 36] that set forth requirements for handling the arrest and booking or detention for more than two hours of a foreign national pursuant to this section."<sup>351</sup> Additionally, the California Department of Corrections is charged with notifying foreign nationals of consular assistance rights, and, upon request, furnishing a consulate "with a list of the names and locations of all inmates in its custody that have self-identified that nation as his or her place of birth."<sup>352</sup> Nonetheless, the California legislature did not provide a judicial remedy for noncompliance with these requirements.

The Oregon and North Carolina statutes offer less protection. One Oregon statute requires its Board on Public Safety Standards and Training to ensure that all police officers "understand the requirements of the Vienna Convention on Consular Relations and identify situations in which the officers are required to inform a person of the person's rights under the convention."<sup>353</sup> Another imposes a requirement for Article 36 notification, but only when a foreign national is detained for "care, custody or treatment for mental illness."<sup>354</sup> North Carolina has a similar statute governing consular notification when foreign nationals are involuntarily detained for mental health reasons, and requiring that the governor notify consular officials of a foreign national's commitment.<sup>355</sup> These statutes do not provide a remedy for violations, and they include inconsistent levels of protection for different foreign nationals.

Although the *Sanchez-Llamas* majority's interpretation of Article 36(2) gives lawmakers the ultimate power over Article 36 enforcement, it is unclear how this power will be exercised. Legislatures, at their discretion, can enact laws that either help or hinder Article 36 enforcement, as evidenced by existing statutes addressing Article 36.

### C. Civil Remedies

Although *Sanchez-Llamas* does not address civil remedies for Article 36 violations, the decision will affect the future success of such

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351. CAL. PENAL CODE § 834c(a)(3)(c) (West Supp. 2005).

352. *Id.* § 5028(b).

353. OR. REV. STAT. § 181.642 (2006).

354. *Id.* § 426.228 (9)(a).

355. N.C. GEN. STAT. § 122C-344 (2003).

actions. Foreign nationals have sought civil relief for Article 36 violations in Section 1983 civil rights actions and in claims filed under the Alien Tort Statute.

One such case is *Jogi v. Voges*.<sup>356</sup> In *Jogi*, the Seventh Circuit held that federal courts have subject matter jurisdiction to hear civil actions based on Article 36 violations filed under 28 U.S.C. § 1350, the Alien Tort Statute (ATS). The ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>357</sup> The plaintiff in *Jogi* served six years of a twelve-year sentence for aggravated battery and was not notified of his Article 36 rights. Upon release and deportation, he filed a *pro se* complaint under the ATS seeking relief for the violation of his Article 36 rights.<sup>358</sup>

The district court held that it lacked jurisdiction over Jogi’s complaint, because the ATS applies only to “shockingly egregious violations of universally recognized principles of international law,”<sup>359</sup> and because Jogi “failed to sufficiently plead a tort under the ATS.”<sup>360</sup> The Seventh Circuit reversed, finding that Article 36 created an implied right of action under the ATS. The court determined that “the drafters of the treaty intended to make . . . it privately enforceable.”<sup>361</sup> As a result, where no judicial remedy existed for an Article 36 violation in a criminal case, “a damages action [was] the only avenue left” to give “full effect” to the rights in Article 36.<sup>362</sup> Although the Seventh Circuit did not find that an Article 36 violation is a tort, the court determined that it was “something along the lines of breach of duty to disclose in the context of special relationship”<sup>363</sup> and thus gave rise to a private right of action.

*Sanchez-Llamas* appears to support the district court’s determination that jurisdiction over Jogi’s complaint was not proper under the ATS because Article 36 does not convey a privately enforceable right. The ATS grants jurisdiction “for a tort only.” The VCCR does not state that an Article 36 violation constitutes a tort or should be remedied in a manner similar to a tort. In finding an implied right of action under Article 36, the Seventh Circuit in *Jogi* relied on the same argument that the *Sanchez-Llamas* dissent used to argue in favor of a suppression remedy. The *Sanchez-Llamas* majority expressly rejected this interpretation of the

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356. 425 F.3d 367 (7th Cir. 2005).

357. 28 U.S.C. § 1350 (2005).

358. 425 F.3d at 370.

359. *Id.* at 371.

360. *Id.*; see also *Jogi v. Piland*, 131 F. Supp. 2d 1024, 1027 (C.D. Ill. 2001).

361. *Jogi v. Voges*, 425 F.3d 367, 384–85 (7th Cir. 2005).

362. *Id.* at 385.

363. *Id.*

Article 36(2) "full effect" requirement. Thus, it is unlikely after *Sanchez-Llamas* that an Article 36 violation can be remedied through a civil action filed under the ATS.

*Sanchez-Llamas* may have implications for section 1983 claims as well. 42 U.S.C. § 1983 "imposes liability on anyone who, under color of state law, deprives a person 'of any rights, privileges, or immunities secured by the Constitution and laws' of the United States."<sup>364</sup> Courts are divided as to whether an Article 36 violation can sustain a claim for civil damages under Section 1983. In *Sorensen v. City of New York*, the District Court for the Southern District of New York found that monetary damages under Section 1983 were not available as a remedy for Article 36 violations.<sup>365</sup> The Court denied relief on the basis that "the Vienna Convention, by its terms, does not require that such violation be redressed by money damages."<sup>366</sup> Further, according to the court, no other country "imposes civil liability upon its municipalities for violation of Article 36."<sup>367</sup> However, the court in *Standt v. City of New York* reached a contrary conclusion, holding that Section 1983 damages are authorized by the provision in Article 36(2) that consular notification be "exercised in conformity with the laws and regulations of the receiving State."<sup>368</sup>

*Sanchez-Llamas* appears to support the determination in *Standt* that civil damages under Section 1983 are available for Article 36 violations. Section 1983 liability results when a person is deprived of "any rights . . . secured by the laws of the United States."<sup>369</sup> The VCCR is a law of the United States by virtue of the Supremacy Clause, and assuming that Article 36 creates individual rights, there is no reason why an Article 36 violation could not be the basis for a Section 1983 action. It is irrelevant that the VCCR does not authorize this relief, because the liability arises under "the laws and regulations of the receiving State."

Remedies must be carefully chosen, however. The Supreme Court ruled in *Heck v. Humphrey* that if a civil "judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence . . . the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated."<sup>370</sup> In *Diaz v. Van Norman*, the district court held that *Heck* barred a Section 1983 action based on Article 36 because the action challenged the

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364. *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) (citing 42 U.S.C. § 1983).

365. 2000 WL 1528282 (S.D.N.Y. 2000).

366. *Id.* at 6.

367. *Id.* at 7.

368. 153 F. Supp. 2d at 429.

369. 42 U.S.C. § 1983 (2005).

370. 512 U.S. 477, 487 (1994).

"circumstances underlying [the plaintiff's] continued confinement."<sup>371</sup> Most recently, in *DeLos Santos-Mora v. Bradenham*, the Fourth Circuit held that a plaintiff's ATS claim based on an Article 36 violation was not barred by *Heck*, on the ground that "[*Sanchez-Llamas*] noted that Article 36 . . . does not implicate any right to consular intervention or cessation of the criminal investigation and that violation of any rights under Article 36 would not trigger application of the exclusionary rule."<sup>372</sup>

The difficulties associated with claims under the ATS and Section 1983—along with the conflict between civil remedies and existing criminal prosecutions—suggest that civil litigation of Article 36 claims faces significant jurisprudential hurdles.

## V. CONCLUSION

Article 36 of the VCCR Treaty serves as a safeguard to ensure that foreign nationals arrested in another country are afforded the right to contact their consulate so that both can develop a meaningful dialogue to protect the foreign national from the cultural barriers and chaos which often surrounds detention for alleged criminal activity. Detained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar.<sup>373</sup>

Manipulation of a detained national by federal and local authorities<sup>374</sup> may interfere with the detainee's understanding and invocation of fundamental rights guaranteed by the U.S. Constitution.<sup>375</sup>

The Supreme Court in *Sanchez-Llamas v. Oregon* for the first time decided certain substantive issues relating to Article 36. The Court's rulings on these complex issues leave significant questions unanswered. The Court, like many federal circuit and state courts, refused to rule on whether Article 36 provides foreign nationals with enforceable individual rights. The Court also stood fast on the position that Article 36 does not trump federal or state court procedural default rules. Yet, the Court did find that Article 36 violations may affect the voluntariness of the confessions or statements of foreign nationals.

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371. 351 F. Supp. 2d 679, 682 (E.D. Mich. 2005).

372. 2006 WL 2326964 (4th Cir. 2006).

373. LEE, *supra* note 8, at 145 (quoting U.S. Dep't of State, Telegram 40298 to Embassy Damascus, Feb. 21, 1975).

374. Brief of the NACDL, *supra* note 9, at 8.

375. Kadish, *supra* note 14, at 605.

On the other hand, the dissent took the strong position that Article 36 provides enforceable individual rights, which would permit foreign nationals to raise an array of fundamental issues beyond that of voluntariness. The dissent also disagreed with the majority on the critical procedural default issue, stating that the majority's position is inconsistent with a reasoned historical interpretation of the purpose of the VCCR, which was to protect the detained foreign national from denial of the right of consular access.

This Article has attempted to grapple with many of the questions that remain unanswered in the *Sanchez-Llamas* majority opinion. Political and civil remedies will not solve the multitude of problems that can arise when a foreign national is arrested in the United States. Various judicial remedies remain available for addressing these problems. The Supreme Court, in its holding on the voluntariness issue, has opened the door wide to myriad other analogous issues surrounding Article 36 of the VCCR. *Sanchez-Llamas* will undoubtedly be the first in a long line of cases which will be subject to Supreme Court scrutiny in the years to come.